United States Court of Appeals

for the Second Circuit

APPENDIX

NO. 77-7111

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PAUL KUCZO, JR., and
JOHN J. P. NOCERINO,

Plaintiffs-Appellees,

v.

WESTERN CONNECTICUT BROADCASTING COMPANY,
KINGSLEY GILLESPIE and JULIAN SCHWARTZ,

Defendants,

WESTERN CONNECTICUT BROADCASTING COMPANY
and KINGSLEY GILLESPIE,

Defendants-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

UNITED STATES COURT OF APPEALS
FILED
APR 20 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

JOINT APPENDIX

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CASILLAS PRESS, INC.—1717 K Street, N.W.—Washington, D.C.—223-1220

PAGINATION AS IN ORIGINAL COPY

JOINT APPENDIX

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RCZ

CIVIL DOCKET

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Jury demand date:

D. C. Form No. 106 Rev. U. S. Court of Appeals #77-7111

TITLE OF CASE	ATTORNEYS
PAUL KUCZO, JR. and JOHN J. P. NOCERINO, both of the City of Stamford, County of Fairfield and State and District of Connecticut vs WESTERN CONNECTICUT BROADCASTING COMPANY, a corporation located in the City of Stamford, State and District of Connecticut; KINGSLEY GILLESPIE and JULIAN SCHWARTZ, both of Stamford	For plaintiff: Sidney Vogel Vogel and Sigsway 25 Belden Avenue P. O. Box 227, Belden Station Norwalk, Connecticut 06852 9/23/76 Hirschberg, Pettengill, Strong & Nagle 25 Third St. Stamford, Connecticut 06905 For defendant: Paul C. Jamieson Maurice J. Buckley 9-23-76 500 ~~666~~ ~~500~~ Summer Street (12/11/74) Stamford, Connecticut 06901 (Firm: Buckley, Jamieson & Ackerly Leo Gold (For: Julian Schwartz) Mackler and Gold 589 Bedford Street Stamford, Connecticut 06901 Of Counsel: Dow, Lohnes & Albertson 1225 Connecticut Avenue, N.W. Suite 500 Washington, D. C. 20036 (For Western Connecticut Broadcasting Company and Kingsley Gillespie)

STATISTICAL RECORD	COSTS			DATE			
				1972			
J.S. 5 mailed	Clerk			10/2			
				10/2			
							15.00
J.S. 6 mailed	Marshal			1973			
				1974			
Basis of Action: Damages occasio	Docket fee			1975			
vs by violation of Pltfs.				1976			
Civil Rights in use of Radio	Witness fees			1977			
broadcasting time. 42 USC 1985				1/28	Atty. Jamieson		
~~Action arose at~~: $100,000.	Depositions				APPEAL	$5.00	
				2/4	Deposit		$5.00
				3/4	Atty. Jamieson		
					APPEAL	$5.00	
				3/11	Deposit		$5.00

DATE	PROCEEDINGS	Date Order Judgment M
1972		
10/20	Complaint, filed.	
10/25	Motion for Appointment of Person to Serve Process, filed.	
10/25	Order entered appointing Samuel N. Cioffi to serve process. EARL, C.	
10/25	Summons issued and together with copies of same and of Complaint, Motion and Order, mailed to Atty. Vogel to give to Mr. Cioffi for service.	
11/1	Return of Samuel Cioffi showing service, filed. Summons and Complaint.	
11/7	Appearance of Paul C. Jamieson, Esq., entered for the defendants.	
11/7	Appearance of Maurice J. Buckley, Esq., entered for the Defendants.	
11/15	Appearance of Leo Gold, Esq., entered for Defendant Julian Schwartz.	
11/15	Motion for Extension of Time, filed by Defendant Julian Schwartz.	
11/16	Motion for More Definite Statement, filed by Defendants Western Connecticut Broadcasting Company and Kingsley Gillespie	
11/22	Motion for More Definite Statement and Notice of Motion, filed by Defendant Julian Schwartz.	
12/4	Hearing on Defendants' (Western Connecticut Broadcasting Company and Kingsley Gillespie) Motion for More Definite Statement. Decision Reserved. Latimer, M.	
12/4	Hearing on Defendant's (Julian Schwartz) Motion for More Definite Statement Decision Reserved. Latimer, M.	
12/4	Memorandum on Defendant's Motion for More Definite Statement, filed by Plaintiff. (To file further papers within 1 week - per Motion Calendar).	
12/5	Defendant's (Julian Schwartz) Motion for Extension of Time, endorsed: "Motion Off" . 12/4/72 Latimer, M. M-12/6/72. Copies to Attys. Vogel, Jamieson and Gold.	
12/5	Recording of Proceedings before Latimer, M., December 4, 1972, filed, at Bpt.	
12/11	Memorandum on Defendant Julian Schwartz's Motion for More Definite Statement, filed by Defendant, Julian Schwartz.	
12/11	Supplemental Memorandum, filed by Plaintiffs.	
1973		
3/16	Ruling on Defendants' Motions for More Definite Statement: Denied, without prejudice either to Defendants' recourse to discovery proceedings to clarify matters at issue or to Defendants' right to challenge the sufficiency of plaintiffs' claims in further proceedings herein, cf. Rule 12(b)(2), Fed. R. Civ. P. Latimer, M. So Ordered, Zampano, J. M-3/16/73. Copies to Attys. Vogel, Jamieson, Buckley and Gold. Copies to MJB, TEC, JOM, AHL and U. Conn. Law Review.	
3/29	Answer of Defendant, Julian Schwartz, filed.	

PAUL KUCZO, JR., et al vs WESTERN CONNECTICUT BROADCASTING COMPANY, et al

RCZ

D. C. 110 Rev. Civil Docket Continuation

DATE 1973	PROCEEDINGS	Date Of Judgment
3/28	ANSWER of the Defendants, Western Connecticut Broadcasting Company and Kingsley Gillespie, filed.	
3/29	Motion to Strike and Notice of Motion, filed by Plaintiffs.	
4/17	HEARING on Plaintiff's Motion to Strike, endorsed: "Motion continued to 5/7/73 by agreement". Latimre, M. M-4-17-73". Copies to counsel.	
5/4	Memorandum of Defendant, Julian Schwartz in Opposition to the Plaintiffs' Motion to Strike, filed.	
5/7	Per Motion Calendar of Latimer, M: Plaintiff's Motion to Strike, Off, without prejudice. Endorsement on Motion filed 5/8/73. Copies to counsel. M-5/9/73.	
8/3	Placed on Trial List.	
12/11	Change of address for attorneys Janieson and Buckley, filed.	
1975		
2/18	The Defendants', Western Connecticut Broadcasting Company and Kingsley Gillespie, List of Proposed Witnesses, filed.	
2/18	List Of Witnesses, filed by defendant Julian Schwartz.	
3/10	Pretrial Report, filed. Pretrial conference held Feb.18,1975. Ready for trial after Apr.1,1975. (Special Masters Louis Evans, Edward Winnick) SO ORDERED ZAMPANO, J. M-3/14/75. Copies to Attys. Janieson, Buckley, Gold and Vogel.	
3/27	Suggestion Of Correction Of Record, filed by defendants Western Conn. Broadcasting Co and Gillespie.	
4/7	Suggestion of Correction of Record, filed by defendants Western Conn. Broadcasting Co. and Kingsley Gillespie, endorsed: Granted. Zampano, J. Copies to counsel of record. M-4/8/75. (Suggested that "pre-trial report of Mar. 3, 1975 and ordered on Mar. 10, '75, be corrected by changing paragraph VI thereof to recite that only the defts., WesternCt. Broad. Co. and Kingsley Gillespie and Julian Schwartz, filed lists of witnesses but not the plaintiffs").	
1976		
0	CALL OF COURT ASSIGNMENT LIST: Over to May 24,1976. LUMBARD,J. (DeRosa, JC)	
9/23	Defendants' (Western Conn. Broadcasting Co. and Kingsley Gillespie) Motion for Summary Judgment, filed.	
9/23	Defendants' (Western Conn. Broadcasting Co. & Gillespie) Statement of Facts in Support of Summary Judgment Motion, filed.	
9/23	Memo. of Law in Support of Defendants' Summary Judgment Motion, filed.	
9/23	Affidavit of KINGSLEY GILLESPIE, filed on behalf of defendants.	
10/12	Defendant JULIAN SCHWARTZ Motion for Summary Judgment, filed.	

— OVER —

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DATE	PROCEEDINGS	Date Or Judgment
1976		
10/14	Letter, dated 10/1/76 to Judge Zampano requesting extension to Oct.20,1976 for filing opposition memorandum and to Oct.25,1976 for request for oral arguments, filed by pltf. and endorsed: "Granted." ZAMPANO,J. M-10/20/76. Copies to counsel.	
10/22	Memorandum in Opposition to Motion for Summary Judgment, filed.	
10/22	Affidavit of PAUL KUCZO, JR., filed.	
10/29	Reply to Opposition to Motion for Summary Judgment, filed.	
11/3	CALL OF COURT ASSIGNMENT LIST: File with Judge Zampano on Motion For Summary Judgment. Lumbard,J. (DeRosa,DC,Beecher,R)	
12/22	MEMORANDUM DECISION, filed and entered. LUMBARD, J., Sitting by Designation. Defendants' Motion for Summary Judgment is denied. M-12/30/76. Copies to counsel and TEC, MJB, RCZ, JON, JEL, AHL, FOE, U. Conn. Law Review.	
1977		
1/6	Defendants' Motion To Amend Order To Permit Appeal Pursuant to 28 USC 1292(b), filed.	
1/6	Memorandum Of Law In Support Of Defendants' Motion To Amend Order To Permit Appeal Pursuant To 28 USC 1292(b), filed.	
1/19	ORDER, filed and entered. LUMBARD, J., Sitting by Designation. Ordered that Order entered on December 22, 1976 be amended to permit Western Connecticut Broadcasting Company to seek permission from U. S. Court of Appeals for the Second Circuit to appeal from this Order. (See Order for further details.) M-1/19/77 Copies to JEL, TEC, MJB, RCZ, JON, AHL, FOE and U. Conn. Law Review.	
1/28	Notice of Appeal from Memorandum of Decision filed 12/22/76 as amended by Order entered 1/19/77, filed by defendants Western Conn. Broadcasting Company and Kingsley Gillespie. Copies to all counsel.	
1/28	Civil Appeals Management Plan and Forms C and D handed to representative of Atty. Jamieson.	
1/28	Certified copies of Docket Entries and Notice of Appeal forwarded Clerk, U. S. Court of Appeals.	
2/3	Acknowledgement of receipt of copies of Docket Entries, etc. received from Clerk, U. S. Court of Appeals.	
2/4	Withdrawal of Notice of Appeal, filed by Defts. Western Conn. Broadcasting Co. and Kingsley Gillespie.	
2/11	Withdrawal of Notice of Appeal, endorsed: "Permission to withdraw the notice of appeal is hereby granted without prejudice to the defendants' petition for Sec.1292(b) or to any other appeal in this action." LUMBARD, J., Sitting by designation. M-2/11/77 Copies to all counsel, certified copy to U. S. Court of Appeals.	
3/2	Copy of Order of U. S. Court of Appeals, dated 2/24/77 filed by Atty. Jamieson for Defts. Western Conn. Broadcasting Co. and Kingsley Gillespie. Ordered that motion made by counsel for petitioner dated Jan. 27, 1977	

(CONTINUED ON PAGE 3)

IL
3 KUCZO VS. WESTERN CONN. BRAODCASTING CO., et al B-623

D. C. 110 Rev. Civil Docket Continuation

DATE 1977	PROCEEDINGS	Date Order or Judgment Not
3/2 (cont.)	for leave to appeal pursuant to 28 USC Sec. 1292(b) is granted. (Mansfield, VanGraafeiland and Carter, J's)	
3/4	Cost Bond on Appeal Secured by Cash Deposit, filed by Defts. Western Conn. Broadcasting Co. and Kingsley Gillespie. Copies to all counsel.	
3/10	Civil Appeal Scheduling Order #1, filed. (Record on Appeal due on or before March 28, 1977.)	
3/11	Acknowledgment of receipt of copies of Cost Bond on Appeal, etc., received from Clerk, U. S. Court of Appeals.	

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. and JOHN J. P. NOCERINO, both of the City of Stamford, County of Fairfield and State and District of Connecticut,	)	
Plaintiffs	)	
v.	)	COMPLAINT
WESTERN CONNECTICUT BROADCASTING COMPANY, a corporation located in the City of Stamford, in said State and District of Connecticut; KINGSLEY GILLESPIE and JULIAN SCHWARTZ, both of said Stamford,	)	Civil Action No. B-623
Defendants	)	

FILED
OCT 23 1 05 PM '72
U.S. DISTRICT COURT
NEW HAVEN, CONN.

1. Plaintiffs are citizens of the United States and of the State of Connecticut, and during all the times herein mentioned were, and now are, residents of the City of Stamford, in the County of Fairfield, in the District and State of Connecticut. The defendant Western Connecticut Broadcasting Company is the operator of radio station WSTC AM and FM, in said City of Stamford, and, during all the times herein mentioned, was, and presently is, licensed for public broadcasting by radio in the City of Stamford and southwestern Connecticut area. Defendant Kingsley Gillespie, during all the times mentioned in this complaint, was, and on information and belief now is, President and majority stockholder of the corporate defendant. Defendant Julian Schwartz, during all the times mentioned in this complaint, was General Manager of the radio station above mentioned as operated by the corporate defendant.

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2. This action arises under the United States Constitution, particularly under the provisions of the First and Fourteenth Amendments thereto, and under the laws of the United States, particularly under the Civil Rights Act, Title 42 of the United States Code, §1985, and under the provisions of Title 28 of the United States Code, §1343, and by virtue of said constitutional provisions and statutes this Court has jurisdiction.

3. In the period June 1969 to November 1969, the plaintiff Kuczo was candidate of the Democratic Party in the City of Stamford for election to the post of Mayor of said city; at said time and place, the plaintiff Nocerino was the Fusion Party candidate for the same office.

4. At said time and place, both plaintiffs were actively campaigning in said city in the furtherance of their nominations and in the effort to prevail in forthcoming elections, and for said purpose both engaged time upon the radio station operated by the corporate defendant WSTC to deliver their messages and to debate or discuss statements or notices by opposing candidates.

5. On many occasions in the period, and in violation of the plaintiffs' civil rights, and in violation of the statutes and regulations of the Federal Communications Commission, the defendants, and each of them, did unlawfully and improperly censor the material sought to be broadcast by the plaintiffs, failed to afford them opportunity to respond or reply to allegations made by other competing candidates, and discriminated against them and in favor of competing candidates in time locations of programs in the fact of such censorship or in the use of

languages other than English for appeals in the course of their campaign to non-English speaking citizens and voters, all to the detriment and damage of both plaintiffs and to their serious hindrance in the conduct of their campaigns.

6. In the accomplishment of the purposes and acts recited in the preceding paragraph, the three defendants conspired together and acted in concert to accomplish the same.

The plaintiffs claim:

1. One Hundred Thousand ($100,000) Dollars damages.

2. Punitive damages.

Dated at Norwalk, Connecticut, this 19th day of October, 1972.

Sidney Vogel
Sidney Vogel
Attorney for Plaintiffs

Vogel & Sigaway
25 Belden Avenue
P.O. Box 227, Belden Station
Norwalk, Connecticut 06852

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. and JOHN J. P. NOCERINO, both of the City of Stamford, County of Fairfield and State and District of Connecticut Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, a corporation located in the City of Stamford, in said State and District of Connecticut; KINGSLEY GILLESPIE and JULIAN SCHWARTZ, both of said Stamford, Defendants	Civil Action No. B-623

ANSWER OF DEFENDANT, JULIAN SCHWARTZ

FIRST DEFENSE

This court has not acquired jurisdiction over the defendant Julian Schwartz because a copy of the summons and complaint was left at a certain store premises known as 242 Bedford Street, Stamford, Connecticut, which premises do not constitute the dwelling house nor usual place of abode of the defendant Julian Schwartz.

SECOND DEFENSE

The complaint fails to state a claim against the defendant upon which relief can be granted.

THIRD DEFENSE

The court lacks jurisdiction over the subject matter.

FOURTH DEFENSE

1. Paragraph 1 of the complaint is admitted.

2. Paragraphs 2, 4, 5 and 6 are denied.

3. So much of Paragraph 3 which states that the plaintiffs were candidates for the office of mayor is admitted, as to the remainder of said paragraph, this defendant does not have sufficient information upon which to form a belief and therefore, leaves the plaintiffs to their proof.

FIFTH DEFENSE

The right of action set forth in the complaint did not accrue within three years next before the commencement of this action.

The Defendant, Julian Schwartz

By Mackler and Gold
Mackler and Gold
His Attorneys

This is to certify that a copy of the foregoing was mailed postage prepaid to Sidney Vogel, Esq., Vogel & Sigsway, 25 Belden Avenue, Norwalk, Connecticut, and Buckley, Jamieson & Ackerly, 500 Summer Street, Stamford, Connecticut on March 28, 1973.

Leo Gold
Leo Gold

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL KUCZO, JR., and JOHN J. P. NOCERINO	)	
	)	Civil Action
VS.	)	
	)	No. B-623
WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE and JULIAN SCHWARTZ	)	

ANSWER OF THE DEFENDANTS, WESTERN CONNECTICUT BROADCASTING COMPANY and KINGSLEY GILLESPIE.

FIRST DEFENSE:

Paragraph 1 of the plaintiffs' complaint is admitted.

So much of paragraph 3 of the plaintiffs' complaint as alleges that the plaintiffs were candidates for office in the City of Stamford is admitted and, as to the remainder thereof, these defendants leave the plaintiffs to their proof.

Paragraphs 2, 4, 5 and 6 of the plaintiffs' complaint are denied.

SECOND DEFENSE:

The complaint fails to state a claim against these defendants upon which relief can be granted.

THIRD DEFENSE:

The Court lacks jurisdiction over the subject matter.

FOURTH DEFENSE:

The cause of action set forth in the complaint did not accrue within the time limited for the commencement of actions of the nature alleged in the plaintiffs' complaint.

THE DEFENDANTS, WESTERN CONNECTICUT BROADCASTING COMPANY and KINGSLEY GILLESPIE

By _____
Maurice J. Buckley

_____
Paul C. Jamieson
Their Attorneys
500 Sumner Street
Stamford, Connecticut

CERTIFICATION

This is to certify that a copy of the foregoing answer was mailed on March 28, 1973, postage prepaid, to:

Leo Gold, Esq.
Mackler & Gold
589 Bedford Street
Stamford, Connecticut

Sidney Vogel, Esq.
Vogel & Sigsway
P. O. Box 217, Belden Station
Norwalk, Connecticut

Paul C. Jamieson

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	Civil Action No. B-263

FILED
SEP 23 3 13 PM '76
DISTRICT COURT
BRIDGEPORT, CONN

MOTION FOR SUMMARY JUDGMENT

Defendants Western Connecticut Broadcasting Company and Kingsley Gillespie move, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment, in their favor, on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

In support of this Motion, defendants submit the following:

(a.) STATEMENT OF FACTS IN SUPPORT OF SUMMARY JUDGMENT MOTION

(b.) MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' SUMMARY JUDGMENT MOTION

(c.) AFFIDAVIT OF KINGSLEY GILLESPIE and attached certified documents

DEFENDANTS, Western Connecticut Broadcasting Company and Kingsley Gillespie

September 23, 1976

By Paul C. Jamieson
Paul C. Jamieson

Their Attorney
500 Summer Street
Stamford, Connecticut 06901

Of Counsel:

Dow, Lohnes & Albertson
1225 Connecticut Ave., N.W.
Washington, D. C. 20036

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	)	Civil Action No. B-263

STATEMENT OF FACTS IN SUPPORT
OF SUMMARY JUDGMENT MOTION

In compliance with Local Rule 10(a) 3., Defendants Western Connecticut Broadcasting Company and Kingsley Gillespie submit the following statement of the material facts as to which they contend there is no genuine issue to be tried:

1. In 1969, Western Connecticut Broadcasting Company ("Western") was the Federal Communications Commission ("FCC") licensee of radio stations WSTC and WSTC-FM in Stamford, Connecticut. Kingsley Gillespie was President, Treasurer, Director and majority stockholder in Western and Julian Schwartz was Secretary and Director of Western and General Manager of the radio stations.

2. The day-to-day operation of the radio stations was handled exclusively by Julian Schwartz who, however, met daily with Kingsley Gillespie to discuss programming and other policy decisions.

3. The 1969 mayoral campaign in Stamford featured three male, caucasian candidates: Julius Wilensky, Republican; Paul Kuczo, Jr., Democrat; and, John J. P. Nocerino, Fusion Party.

4. Each of these candidates utilized the facilities of WSTC and WSTC-FM during the campaign in the form of purchasing spot announcements and programs as well as furnishing press releases to the stations. Each candidate ran some announcements and/or programs that utilized his voice.

5. During this campaign, Julian Schwartz informed candidates Kuczo and Nocerino that he, Schwartz, would review the scripts of their paid political announcements and programs before broadcast on WSTC. The purpose of the script review was to make certain that the material met Schwartz's standard for good taste.

6. Julian Schwartz did not review the scripts of the third candidate, Julius Wilensky, because he felt that they would be in good taste due to their preparation by a professional public relations man. In addition, an employee of WSTC was assisting the Wilensky campaign, on his own time, and was aware of the station's standards enforced by Schwartz.

7. Kingsley Gillespie was aware of Schwartz's policy in this campaign of requiring candidates for political office to submit their scripts of paid announcements for review by Schwartz before broadcast. He was not aware that Schwartz was handling the three mayoral candidates in a dissimilar fashion.

8. On occasion during this 1969 campaign, Schwartz insisted that certain material be deleted from the scripts of

the Democratic and Fusion Party candidates. These deletions were required by Schwartz in order to preserve the "image" of the stations, and consisted of material Schwartz felt was in bad taste, i.e., name-calling, exaggerations, challenges to a persons' reputation.

9. Kingsley Gillespie was not aware of these deletions and did not learn of Schwartz's actions until after the election held on November 4, 1969. Neither Paul Kuczo, Jr. nor John J. P. Nocerino ever spoke to Gillespie concerning Schwartz's review and alteration of their scripts.

10. On October 8, 1970 the FCC issued a "Show Cause" Order initiating an inquiry into whether Western's radio stations had violated Section 315(a) of the Communications Act of 1934, as amended, in the 1969 Stamford mayoral campaign.

11. After a lengthy hearing, covering five days, at which Kingsley Gillespie, Julian Schwartz, Paul Kuczo, Jr. and John J. P. Nocerino testified, the FCC Hearing Examiner found that Schwartz's review and alteration of the scripts of candidates Kuczo and Nocerino violated the censorship and equal opportunities provisions of Section 315(a).

12. Section 315(a) of the Communications Act of 1934, as amended, provides, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. . . .

13. The FCC affirmed, with certain modifications, the Hearing Examiner's conclusion that Schwartz's actions as General Manager had violated Section 315 during the 1969 Stamford mayoral campaign and, Western, the licensee, was fined by the FCC.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs	)	
v.	)	Civil Action No. B-263
WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	)	

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANTS' SUMMARY JUDGMENT MOTION

This Memorandum is respectfully submitted by defendants Western Connecticut Broadcasting Company ("Western") and Kingsley Gillespie ("Gillespie") pursuant to Local Rule 10(a) in support of their motion, made pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for summary judgment.

INTRODUCTION

This is an action purportedly brought for violations of the First and Fourteenth Amendments of the United States Constitution and the Civil Rights Act of 1871, 17 Stat. 13, 42 U.S.C. §1985 (1970). The plaintiffs are two male, caucasion, Stamford, Connecticut residents who were unsuccessful mayoral candidates in Stamford in 1969. The defendants are Western, a corporation licensed by the Federal Communications Commission ("FCC" or "Commission") to operate radio station WSTC in Stamford,

Connecticut; its President-Treasurer, Kingsley Gillespie; and its former Secretary-General Manager, Julian Schwartz. The complaint alleges that the defendants interfered with Democratic mayoral candidate Paul Kuczo, Jr. and Fusion Party mayoral candidate John J. P. Nocerino in their use of the facilities of radio station WSTC in the 1969 Stamford mayoral campaign. The result was an alleged infringement of the plaintiffs' constitutional and civil rights.

As we show more fully in Point I, plaintiffs' First Amendment claim is fatally defective for lack of governmental action, as is their Fourteenth Amendment claim for lack of the necessary state action. With regard to the alleged violations of the Civil Rights Act of 1871, Point II illustrates that plaintiffs' allegations are factually infirm and totally lacking in any legal support. Subsections (1) and (2) of 42 U.S.C. §1985 prohibit conspiracies designed to prevent a person from accepting a federal office or to obstruct justice in a court of the United States. Neither is present in this case. Subsection (3) of 42 U.S.C. §1985 likewise cannot support plaintiffs' action because of the absence of any conspiracy, the absence of any class-based invidiously discriminatory action and the absence of any deprivation of equal protection of the laws or of equal privileges and immunities under the laws.

STATEMENT OF FACTS

Complaint And Answer

The complaint, filed on October 20, 1972, alleges that the three defendants conspired together (Complaint, ¶6):

(1) to censor material plaintiffs sought to broadcast on radio station WSTC (Complaint, ¶5);

(2) to deny plaintiffs the opportunity to respond or reply to allegations made by other competing candidates (Complaint, ¶5); and,

(3) to discriminate against plaintiffs in the time location of their programs and in the use of languages other than English in their programs (Complaint, ¶5). The complaint concludes that these alleged actions created a cause of action under 42 U.S.C. §1985 and the First and Fourteenth Amendments.

Defendants Western and Gillespie answered this complaint on March 28, 1973, generally denying plaintiffs' allegations, denying the court's subject matter jurisdiction, denying the existence of a cause of action upon which relief could be granted and raising the affirmative defense of a statute of limitations bar.

1969 Stamford Mayoral Campaign

There were three candidates in the 1969 Stamford mayoralty race. Julius Wilensky, the Republican candidate, was endorsed by the Republican Town Committee and did not face a primary election. John J. P. Nocerino, formerly a Republican, ran as an independent candidate on the Fusion Party ticket and was also spared a primary campaign. Paul Kuczo, the Democratic candidate, defeated the incumbent mayor, Bruno Giordano, by six votes in a September primary. The general election took place on November 4 and was won by Julius Wilensky, who received 19,816 votes to Kuczo's 15,415 and Nocerino's 723 (Affidavit of Kingsley Gillespie and Attachment A).

During the 1969 Democratic primary and the general election campaigns for mayor of Stamford, Connecticut, Julian Schwartz, then General Manager of Station WSTC and Secretary and Director of Western required all the candidates, except the Republican candidate for mayor, to submit for review advance scripts of their paid political announcements and programs which they wanted to broadcast over WSTC (Id.).

In addition, on occasion, Schwartz deleted material from the scripts of the Democratic candidate for mayor, Paul Kuczo, which Schwartz deemed in bad taste and, hence, objectionable. Likewise, Schwartz deleted material from the scripts of the Fusion Party candidate, John J. P. Nocerino (Id.).

Federal Communications Commission Action

The allegations presented in a most general and conclusory manner by the plaintiffs in their complaint concern the same matters raised by them before the FCC in 1970 and which were the subject of FCC hearings in 1971 at which Messrs. Kuczo and Nocerino testified. Those hearings resulted in a final FCC decision in 1973. As it is the very same incidents surrounding the 1969 mayoral campaign that are raised in the present complaint, we think it is only fair that the Court should be informed of the earlier FCC actions.

On October 8, 1970 the FCC directed Western to show cause why its licenses for stations WSTC and WSTC(FM) should not be revoked. The FCC "Order to Show Cause and Notice of Apparent Liability" stemmed from an investigation into charges that the licensee, Western, had violated Section 315 of the

Communications Act[1/] during the 1969 mayoral campaign in Stamford. (Affidavit of Kingsley Gillespie and Attachments A, B).

Hearings were conducted in October and December of 1971 by the FCC (Paul Kuczo Jr. testified on October 20, 1971 and John J. P. Nocerino testifed on October 20 and 21, 1971), and an Initial Decision of the FCC Hearing Examiner was released on August 2, 1972. (Affidavit of Kingsley Gillespie, Attachment A). Western was fined $10,000.00 by the Hearing Examiner for illegal censorship of political broadcasts and failure to provide equal opportunities to political candidates. The FCC affirmed this Initial Decision in 1973, agreeing with the Hearing Examiner that Western had violated the censorship and equal opportunities provisions of Section 315 of the Communications Act, as amended.

The FCC found the stations' review and alteration of the scripts of two of three candidates (Nocerino and Kuczo) in the mayoral campaign was a violation of the Section 315 prohibition on censorship and a violation of the equal opportunities provision of Section 315. The FCC reversed, however, the

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1/ Section 315 provides, inter alia:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. . . .

47 U.S.C. §315 (1970).

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Examiner's conclusion that Western had violated the equal opportunities provision on other occasions during this campaign. (Id., Attachment B).

The FCC found that Schwartz's actions were not politically motivated and that his reasons for not reviewing the Republican candidate's scripts[2/] were consistent with his efforts to maintain the stations' image. The Commission accepted the Hearing Examiner's consideration of, and conclusions regarding, the motives of Julian Schwartz. As the Examiner noted:

> In its Order denying reconsideration (30 F.C.C.2d 303, 304-05), the Commission indicated that inquiry would be appropriate into Schwartz's motives in his treatment of Kuczo and Nocerino. Principally, it desired clarification of incidents which led the Bureau to conclude that Schwartz's actions might have been part of a comprehensive scheme to favor one candidate over another. The Bureau, however, absolutely failed to establish the existence of any such scheme.
>
> On the contrary, the reasonable conclusion to be drawn from the evidence is that Schwartz's motives in censoring were those he stated to the candidates and to the Commission. He simply wanted to ensure that all material broadcast over the stations conformed to his standards of good taste. The lack of intention to favor a particular candidate is evidenced by the fact that Schwartz objected to references in the Nocerino scripts which were uncomplimentary to both of the other candidates. He also took a Wilensky announcement attacking Kuczo off the air immediately after he learned of it. These

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2/ Schwartz explained that that he did not review the Republican's script because he felt from other utterances of the candidate that his scripts would not offend "good taste"; an employee of the station independently and on his own time was assisting the Republican candidate, and Schwartz knew that the employee understood the station's standards; and the scripts for the Republican were prepared professionally with the assistance of another man whom Schwartz knew personally and in whom he had complete confidence. 43 F.C.C.2d at 735.

> actions are inconsistent with a view of Schwartz as a man with a fixed purpose to favor the Republican candidate. They are perfectly consistent, however, with a view of him as a man who was imbued with the desire to preserve good taste on his stations.

43 F.C.C.2d at 806.

The FCC concluded that the deletions were required by Schwartz in order to preserve the "image" of the stations, which were described as his "shadows" and which he had strived for almost 25 years to build into respected community voices. The FCC found that the standard which Schwartz used in determining whether deletions were necessary was that of "good taste" and the arbiter of good taste was Schwartz. Material was not in good taste if it involved name-calling, a person's reputation, or an exaggeration, or seemed otherwise objectionable. 43 F.C.C.2d at 731-32.

The Commission further found that Kingsley Gillespie, President and Treasurer of Western, was aware that Schwartz was requiring the submission of scripts but did not know that Schwartz was deleting material. Nevertheless, the licensee, Western, was held responsible for Schwartz's actions because Gillespie failed to exercise adequate supervision over his General Manager. (Affidavit of Kingsley Gillespie and Attachment B). As the FCC concluded:

> Gillespie did not know that Schwartz was deleting material;..., but the licensee must bear responsibility for Schwartz's willful misconduct because Gillespie failed to exercise adequate supervision over his general manager. The record shows Gillespie repeatedly reminded Schwartz about treating the candidates equally; in contrast, Gillespie and Schwartz apparently had not had a discussion with respect to

> censorship since the late 1940's. Gillespie testified that he had told Schwartz in the late 1940's and they had an understanding, that Schwartz "has a right to look at the scripts and suggest to the candidate what was not in good taste, but he had no power to force [the candidate] to change it." Gillespie considered the understanding one "that didn't need reminding of" (Tr. 78). On such an important matter, the prolonged lack of scrutiny or specific reminder certainly constitutes a lack of supervision by the licensee. The licensee cannot escape culpability for its general manager's deliberate violations of the law.

43 F.C.C.2d at 732-33.

Thus, during the 1969 Stamford mayoral campaign, Julian Schwartz, General Manager of Western's radio stations, reviewed the campaign scripts of candidates John J. P. Nocerino and Paul Kuczo, Jr. and deleted material he, Schwartz, felt was in bad taste. Kingsley Gillespie was aware of the review but not the deletions from the scripts. As a result of Mr. Schwartz's actions, the FCC conducted a lengthy proceeding resulting in the imposition of a $10,000.00 fine on the licensee, Western.

The plaintiffs now claim that these same actions of Julian Schwartz constitute actionable civil rights violations by Schwartz, Gillespie and Western. As we will indicate below, there is no legal basis under either the Civil Rights Act of 1871 or the First and Fourteenth Amendments to support plaintiffs' claim nor is there any genuine issue of material fact surrounding these events, and defendants Western and Gillespie are entitled to judgment in their favor as a matter of law.

ARGUMENT

I. Plaintiffs Have Failed To State A Claim Upon Which Relief Can Be Granted Under The First Or Fourteenth Amendments To The United States Constitution.

While plaintiffs' First and Fourteenth Amendment claims are both extremely vague and conclusory, on the basis of the undisputed facts contained in the attached affidavit and supporting documents, it is clear that there is absent that governmental or state action by the defendants necessary for invocation of the First and Fourteenth Amendments.

The First Amendment's proscription that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" is a restriction on governmental action and does not impose restraints on the conduct of private parties.[3/] See Public Utilities Commission v. Pollak, 343 U.S. 451, 461 (1952). This governmental restriction applies to both the federal government, by its very terms, and to the states through incorporation in the due process clause of the Fourteenth Amendment. See Gitlow v. New York 268 U.S. 652, 666 (1925).

The Fourteenth Amendment's guarantees that "[N]o state shall make or enforce any law which shall abridge the privileges

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3/ While the plaintiffs do not specify the provision of the First Amendment under which they are maintaining this action (Complaint, ¶2), it is clear that the free exercise and establishment of religion clauses, as well as the assembly and right to petition clauses are inapplicable. Accordingly, plaintiffs' First Amendment claims must be based on the free speech provision.

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" is similarly a constitutional limitation on state action, and not a restraint on private action.[4/] New York Jaycees v. United States Jaycees, Inc., 512 F.2d 856 (2d Cir. 1975). As the Supreme Court has noted, "[T]he action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

Neither the actions of Julian Schwartz as General Manager of Western nor of Kingsley Gillespie as President and Treasurer during the 1969 Stamford mayoral campaign were the

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4/ Plaintiffs' Fourteenth Amendment claims (Complaint, ¶2) are likewise mere generalizations. However, it is clear that there is absent any deprivation of "life, liberty, or property" necessary to trigger a due process claim and that there is no claim of abridgement of the privileges and immunities of national citizenship, i.e., the right to pass freely from state to state, the right to petition Congress for a redress of grievances, the right to vote for national officers, the right to enter public lands, the right to be protected against violence while in the lawful custody of a United States Marshall, the right to inform the United States authorities of a violation of its laws, Twining v. New Jersey, 211 U.S. 78, 97 (1908); the right to carry on interstate commerce, Crutcher v. Kentucky, 141 U.S. 47, 57 (1892); the right to acquire and retain property, Oyama v. California, 332 U.S. 633, 640 (1948); the right of assembly and privilege of habeas corpus, the right to use the navigable waters of the United States, the right to demand protection of the Federal Government on the high seas or abroad, Slaughter-House Cases, 16 Wall (83 U.S.) 36, 79 (1873). Thus, plaintiffs' action must be based on an alleged denial of equal protection.

actions of the state or federal government.[5/] Nor were the resultant Section 315 violations by Western entertwined with governmental policies or even slightly impregnated with a governmental character as to be subject to the constitutional limitations placed upon state action.[6/]

The most recent statement from the Supreme Court on the "governmental action" doctrine is contained in Jackson v. Metropolitan Edison Co., 419 U.S. 345, 95 S. Ct. 449 (1974). In that case, a due process challenge to an electricity cut-off by a private utility company was rejected. The Court noted that "the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established" and declined to find state action despite the fact that the defendant was a utility company, enjoyed a state-protected partial monopoly and was subject to extensive regulation by the state. The Court discussed the factors which are relevant

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5/ As will be indicated below, the fact that Schwartz and Gillespie were officers/directors of Western is, given Western's status as an FCC licensee, the only possible avenue by which their individual actions could become relevant for state action purposes, and, as will be indicated, this is a legally insufficient basis for imposition of constitutional constraints.

6/ While state action for Fourteenth Amendment purposes is sometimes distinguished from the governmental action necessary to invoke the First Amendment's proscriptions, the phrase "state action" is often generally referred to as the necessary prerequisite for implementation of any constitutional constraints on private conduct under both of these amendments. See McGlotten v. Connally, 338 F. Supp. 448, 455 n.11 (D.D.C. 1972) (three-judge court).

to a determination of "whether there is a sufficiently close nexus between the [the government] and the challenged action of the regulated entity [the licensee] so that the action of the latter may be fairly treated as that of the [government] itself." 95 S. Ct. at 453.

These factors are:

a. whether the regulated entity is privately owned and operated, 95 S. Ct. at 453, 457;

b. whether the regulated entity was involved in the exercise of some power delegated to it by the government "which is traditionally associated with sovereignty," 95 S. Ct. at 454;

c. whether the government, through the regulatory body, has "put its own weight on the side of the...practice by ordering it," 95 S. Ct. at 456-57;

d. whether the action complained of was taken at the initiative of the regulated entity rather than at the initiative of the government or the regulatory body, 95 S. Ct. at 457; and,

e. whether the government has "so far insinuated itself into a position of interdependence with the [private entity] that it was a joint participant" in the action complained of, 95 S. Ct. at 457. 7/

7/ The Court also discussed the factors which, although possibly relevant, would not be sufficient, in and of themselves, to convert the actions of a regulated entity into "governmental action" for purposes of imposing constitutional restraints thereon. These factors are:

1. whether a business is subject to governmental regulation, 95 S. Ct. at 453;
2. whether such governmental regulation is extensive and detailed, 95 S. Ct. at 453;
3. whether the regulatory body has conferred monopoly status upon the regulated entity, 95 S. Ct. at 454;

Applying these criteria to the material facts in this case, it is clear there is no "sufficiently close nexus" between the government and the actions of the licensee (manifested through Schwartz's deletions or Gillespie's inaction) to warrant imposition of constitutional restraints upon such action. The undisputed facts presented by this controversy are that a privately owned and operated corporation (see factor a) licensed by the FCC to operate a radio station in order that the "public interest, convenience and necessity" might be served, reviewed and altered the scripts of two mayoral candidates in 1969. No governmental official participated in these actions nor did the FCC order, request, encourage, cooperate in or approve Western's actions (see factors c and d). In fact, the FCC fined Western for violations of the Communications Act and the Commission's Rules and Regulations. Accordingly, there is absent the type of "symbiotic relationship" between the government and Western wherein the government is a "joint participant" in the activity complained of (see factor e).

In addition, although the FCC's licensing authority over Western stems from its congressionally delegated duty to

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Note 7 cont'd

4. whether the regulated entity provides an arguably essential service "affected with the public interest," 95 S. Ct. at 455;
5. whether, under the scheme of regulation, the regulated entity is required to obtain approval for certain practices which "a business regulated in less detail would be free to institute without any aproval from a regulatory body," 95 S. Ct. at 456; and,
6. whether the type of action complained of was considered by the regulatory body to be within the discretion granted to the regulated entity by the applicable law, 95 S. Ct. at 457.

regulate the broadcasting industry in certain respects, such regulation is not pervasive.[8/] United States v. Radio Corporation of America, 358 U.S. 334, 350 (1959); Columbia Broadcasting Sys., Inc., v. Democratic Nat'l Committee, 412 U.S. 94, 120 (1973) (see factors 1 and 2). In Jackson v. Metropolitan Edison Co., supra the Court held that state regulation does not by itself convert private conduct into state action for purposes of the Fourteenth Amendment, citing, Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972). In fact, the Court went further and held that extensive and detailed regulation would not create the necessary state action, citing, Public Utilities Commission v. Pollak, 343 U.S. 451, 462 (1952). Rather the inquiry must focus on the challenged action of the regulated entity and its relationship to the state. For example, in Pollak, the challenged activity had received the specific approval of the government agency and this point was given great significance by the Court in Moose Lodge:

> Unlike the situation in [Pollak], where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, the Pennsylvania Liquor Control Board has neither approved nor endorsed the racially discriminatory practices of Moose Lodge.

407 U.S. at 175-76 n.3.

Certainly the FCC's licensing of Western does not transform private actions, especially those contrary to the

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8/ For example, Section 326 of the Communications Act prohibits FCC censorship of a licensee's broadcasts.

agency's regulatory mandate, into governmental actions. Western's violations of Section 315 of the Communications Act, as amended, cannot be equated with the exercise of some power delegated to it by the FCC "which is traditionally associated with sovereignty" (see factor b). As the Supreme Court noted in FCC v. Sanders Brothers Radio Station, 308 U.S. 470, 475 (1940), the Communications Act "does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

In Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973), the Supreme Court rejected a first amendment challenge to a broadcaster's refusal to sell spot time for editorial advertisements. The Court, noting that it "[had] not previously considered whether the action of a broadcast licensee such as that challenged here is 'governmental action' for purposes of the First Amendment," 412 U.S. at 114, reversed a lower court decision holding that such actions were sufficiently imbued with governmental action to be the subject of constitutional limitations. 412 U.S. at 121. Chief Justice Burger's plurality opinion held that the broadcaster's decision against editorial spot advertisements was based on its own journalistic judgments, 412 U.S. at 118, that the Commission "[had] not fostered the licensee policy challenged..." Id. and, furthermore, that "it cannot be said that the Government is a 'partner' to the action of the broadcast licensee complained of here, nor is it engaged in a 'symbiotic relationship' with the licensee, profiting from the invidious discrimination of its proxy." Id. at 119. Justices Stewart and Rheinquist joined the Chief Justice in noting that "[T]he

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First Amendment does not reach acts of private parties in every instance where the Congress or the Commission has merely permitted or failed to prohibit such acts." Id.[9/]

Thus, the FCC's regulation of broadcasters has never been held sufficient to constitute state action for purposes of imposing constitutional constraints on the actions of private licensees. See e.g., Moro v. Telemundo Incorporado, 387 F. Supp. 920, 924-25 (D. P.R. 1974); Post v. Peyton, 323 F. Supp. 799, 802-04 (E.D.N.Y. 1971); McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597, 600-01 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946). Certainly, the concept of state action cannot be applied to Western's actions in this case, particularly where there has been no specific approval of the challenged broadcaster policy.

Moreover, this is not a situation where the regulated entity was required to obtain, or did obtain, or could have obtained prior FCC approval for the actions complained of (see factor 5). Neither the Communications Act (section 315) nor the Commission's Rules (47 C.F.R. §73.120(b)) allows a licensee to review and/or change a candidate's political scripts. Accordingly, it can hardly be said that the FCC has "put its own weight on the side of the...practice by ordering it." (see factor c).

9/ The Court distinguished the regulatory scheme for broadcasters from that present in Pollak, supra and placed special emphasis on the journalistic freedoms afforded broadcasters under the Communications Act of 1934, as amended. 412 U.S. at 120.

The Second Circuit has also set forth specific factors to be weighed in considering state action claims. These include:

(1) the degree to which the "private" organization is dependent on government aid;

(2) the extent and intrusiveness of the governmental regulatory scheme;

(3) whether that scheme connotes government approval of the activity or whether the assistance is merely provided to all without such connotation;

(4) the extent to which the organization serves a public function or acts as a surrogate for the State; and,

(5) whether the organization has legitimate claims to recognition as a "private" organization in associational or other constitutional terms.

Jackson v. The Statler Foundation, 496 F.2d 623, 629 (2d Cir. 1974), cert. denied, 95 S. Ct. 1124 (1975).

Western, a private corporation (factor (5)) receiving no governmental aid (factor (1)) is neither a surrogate for the state (factor (4)) nor acted, in this instance, with the approval of the state (factor (3)). As noted above, the FCC's regulation of Western is neither pervasive nor intrusive (factor (2)).

Thus, there is absolutely no support for the contention that the actions of Western by virture of the FCC regulation constitute "governmental action" for purposes of imposition of the constitutional restraints of the First Amendment. In similar fashion, there is not a single contact between Western and the State of Connecticut which supports the con-

clusion that the actions of Western are the actions of the state.[10/] This lack of significant and impermissible action by the state in relation to Western's conduct in the 1969 mayoral campaign similarly dictates the conclusion that the Fourteenth Amendment's proscriptions are not applicable to the defendants.

As the Second Circuit noted in Powe v. Miles, 407 F.2d 73, 81 (2d cir. 1968), state regulation unrelated to the challenged activity is insufficient to establish state action since "the essential point [is] that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the activity that caused the injury."[11/]

In summary, the undisputed facts in this case reveal no conduct of essentially governmental functions by Western, Marsh v. Alabama, 326 U.S. 501 (1946), no governmental encouragement of Western's actions, Lombard v. Louisiana, 373 U.S. 267 (1963), no state participation in Western's actions, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and no affirmative government support for Western's actions, Evans v. Newton

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10/ Indeed, the only connection between the state and the defendants is Western's incorporation in Connecticut. This is an inadequate basis for concluding that the wholly private actions of Western constitute state action. See Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

11/ Nor does the present case involve racial discrimination where the application of a less onerous test for state action might be appropriate. Jackson v. The Statler Foundation, 496 F.2d 623, 635 (2d Cir. 1974).

382 U.S. 296 (1966) that would transform these purely private actions into state action subject to constitutional constraint.

In the present case, the very limited involvement of the state with Western is so obviously insignificant and the absence of any state involvement in the challenged activity of Western is so clear that the absence of state action is indisputable.

Thus, to the extent that the complaint alleges, albeit in vague manner, a cause of action under the First or Fourteenth Amendments, it is clearly inadequate. It fails to allege and on the basis of the undisputed facts as revealed by defendants, [illegible] to allege, any government action necessary to invoke these constitutional constraints.

II. Plaintiffs Have Failed To State A Claim Upon Which Relief Can Be Granted Under The Civil Rights Act of 1871, 42 U.S.C. §1985

A. Plaintiffs' Action Does Not Involve Either Federal Office Or The Courts Of The United States

The plaintiffs' allegations of a 42 U.S.C. §1985 violation by the defendants does not specify under which subsection of this statute they are proceeding. Before detailing the infirmities of a §1985(3) cause of action, it should be preliminarily noted that subsections (1) and (2) have no relevance to this proceeding.

Subsection (1) of 42 U.S.C. §1985 gives to any person a right to be free from a conspiracy "to prevent, by force, intimidation, or threat" the acceptance of a federal office "or

from discharging any duties thereof." The subsection also makes actionable a conspiracy "to injure him in his person or property on account of his lawful discharge of the duties of his office." Plaintiffs were not, nor do they allege that they were either holders of, nor candidates for, federal office. Accordingly, this subsection cannot be the basis of their complaint.

Under subsection (2) of 42 U.S.C. §1985, a person who is a party or witness in any court of the United States has a right to be free from a conspiracy to deter, intimidate or threaten him for attending or testifying.

The subsection also gives a grand or petit juror the right to be free from a conspiracy to influence his decision or to injure him for his verdict, presentment or indictment.

Thirdly, the subsection gives to every citizen involved in litigation the right to be free from a conspiracy "for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws."

Clearly none of the factual prerequisites for a Section 1985(2) action is present in the case as is demonstrated by both the complaint and the attached affidavit and supporting documents.

B. Plaintiffs Have Failed To Establish, Or Allege, The Necessary Prerequisites For A §1985(3) Action.

Plaintiffs have failed to allege a cause of action under subsection (3) of 42 U.S.C. §1985[12/] for a multiplicity of reasons, i.e., failure to establish a conspiracy, failure to establish a class that has been the object of invidious discrimination and failure to establish a deprivation of rights protected by §1985(3).

1. Plaintiffs neither constitute a class that has been invidiously discriminated against nor do they so allege in their complaint.

In Griffin v. Breckenridge, 403 U.S. 88, 101-02 (1971), the Supreme Court held that 42 U.S.C. §1985(3) provided a cause

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12/ 42 U.S.C. §1985(3) provides:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection

of action against certain private conspiracies to deprive persons of equal protection of the law or of equal privileges and immunities under the law.

Plaintiffs' complaint, however, includes only vague and conclusory allegations of discrimination and does not state a constitutional claim cognizable under §1985(3). Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975); Powell v. Workmen's Compensation Bd. of State of New York, 327 F.2d 131, 137 (2d Cir. 1964); Valley v. Maule, 297 F. Supp. 958, 959-60 (D. Conn. 1968). Furthermore, the complaint contains no allegations whatsoever that plaintiffs have been subjected to the racial, or otherwise class-based invidiously discriminatory animus which is a requirement for a cause of action under §1985(3), Griffin v. Breckenridge, 403 U.S. at 102.

Note 12 cont'd

> of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Yet the decision in Griffin v. Breckenridge, supra at 102, is clear that:

> The language [of §1985(3)] requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all. [emphasis original; footnotes omitted].

Although it has not yet fully defined the types of class-based discrimination cognizable under Section 1985(3), the Supreme Court has emphatically rejected the notion that the statute encompasses tortious acts which have no element of class discrimination:

> That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others. For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State." * * * The constitutional shoals that would lie in the path of interpreting §1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose--by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment...The language requiring intent to deprive of equal protection, or equal privileges and immunities means that there must be some racial, or perhaps otherwise class-based, invidiously, discriminatory animus behind the conspirators' action. 13/

13/ The necessary class-based invidiously discriminatory animus has been interpreted as "that kind of irrational and odious class discrimination akin to racial bias--such as discrimination based on national origin or religion." Arnold v. Tiffany, 359 F. Supp. 1034, 1036 (C.D. Cal.), aff'd, 487 F.2d 216 (9th Cir. 1973), cert.

The Court amplified this passage by noting that it was not deciding whether a "conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under §1985(3), 403 U.S. at 102 n.9, and adding that the "motivation aspect of §1985(3) focuses not on scienter in relation to deprivation of rights but on invidiously discriminatory animus." Id. at 102 n.10.

Not all of the recent cases interpreting §1985(3) in light of Griffin v. Breckenridge, supra, have held that racial discrimination alone is actionable under §1985(3). However, the majority of cases have held that in order to maintain a cause of action under §1985(3), plaintiffs must allege that they are members of a class that has been subjected to discrimination. This is the law within the Second Circuit.

Writing for the court in Kletschka v. Driver, Judge Ambard dismissed a plaintiff's §1985 complaint because the defendants' alleged discrimination was directed at the plaintiff as an individual; there was no general pattern of discrimination by the defendants; and the defendants' actions were not based on "impermissible considerations of race or class," 411 F.2d 436, 447 (2d Cir. 1969). While Kletschka was decided prior to

Note 13 cont'd

denied, 415 U.S. 984 (1974). See Doyle v. Unicare Health Service, Inc., Aurora Center, 399 F. Supp. 69 (N.D. Ill. 1975). It is clear that those non-racial classes "perhaps" included within Griffin's proscriptions extend to those classes identified by national origin, religion, possibly wealth and possibly sex that are "among those traditionally protected by the Civil Rights Act." Bricker v. Crane, 468 F.2d 1228, 1233 (1st Cir. 1972), cert. denied, 410 U.S. 930 (1973). Plaintiffs are neither members of such a traditionally protected class nor have they demonstrated that they constitute a class for purposes of stating a claim under the equal protection clause of the Fourteenth Amendment.

Griffin, a recent Connecticut case has also held §1985(3) inapplicable where the plaintiff did not claim to be the victim of class-based discrimination, Siegeski v. Ilg, 395 F. Supp. 1253, 1255 (D. Conn. 1975), and other cases within the Second Circuit are in accord, Bergman v. Stein, 404 F. Supp. 287 (S.D.N.Y. 1975); Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 358 (D. Vt. 1975); Newcomer v. Coleman, 323 F. Supp. 1363, 1367 (D. Conn. 1970).

Furthermore, in Weise v. Syracuse University, the court left open the question of whether even sex-based discrimination was actionable under §1985(3). 522 F.2d 397, 408-09 n.16 (2d Cir. 1975). Most of the other Circuits which have considered the question are in agreement that to establish a cause of action under §1985(3), a plaintiff must allege invidiously discriminatory animus that is class-based, rather than directed at an individual. In Hahn v. Sargent, the First Circuit held that "the criteria defining the class [must be] invidious," 523 F.2d 461, 469 (1st Cir. 1975), cert. denied, 44 U.S.L.W. 3545 (Mar. 30, 1976). In Arnold v. Tiffany, the Court held that to be actionable under §1985(3), the class discrimination must be "irrational and odious class discrimination akin to racial bias," 359 F. Supp. 1034, 1036 (C.D. Cal.), aff'd, 487 F.2d 216 (9th Cir. 1973). More recently, the Ninth Circuit has emphasized that plaintiffs must allege more than that they are members of a class composed of the victims of tortious conduct, Lopez v. Arrowhead Ranches, 523 F.2d 924, 928 (9th Cir. 1975). The complaint of Kuczo and Nocerino fails to allege their membership in any class whatsoever, let alone one subject to invidiously discriminatory animus. In Newcomer v.

Coleman, 323 F. Supp. 1363 (D. Conn. 1970), the court dismissed the §1985 claim by stating:

> It so far appears that the actions taken by the defendants were directed only against the plaintiff as an individual, and not because he was a member of a class or race.

323 F. Supp. at 1367.

And in Bergman v. Stein, 404 F. Supp. 287 (S.D.N.Y. 1975) the court, while noting that the plaintiff had alleged that defendants had singled him out as the object of their conspiracy, held that the plaintiff failed to allege that the defendants were motivated to act because of class-based or racial discrimination. Thus, the court dismissed the §1985(3) claim. Id. at 294. See also Milburn v. Blackfrica Promotions, Inc., 392 F. Supp. 434, 436 (S.D.N.Y. 1974) (dismissing §1985(3) claim for, inter alia, failing to allege racial or class-based discrimination);[14/] Waits v. McGowan, 516 F.2d 203, 208 (3d Cir. 1975) (failure to state a cause of action under §1985(3) because of failure to allege "some racial or other class-based, invidiously discriminatory animus").

In the present case, the plaintiffs are two individuals, complaining of actions directed at them as individuals. They have made no attempt to define a class of which they are members which as been discriminated against, despite the requirements

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14/ The failure to allege racial or class-based discrimination would also be fatal to a §1985(2) claim. Condosta v. Vermont Electric Cooperative, Inc., 400 F. Supp. 358, 362 (D. Vt. 1975); Johnston v. NBC, 356 F. Supp. 904, 909 (E.D.N.Y. 1973).

under §1985(3) that plaintiffs must have been subjected to "racial or perhaps otherwise class-based, invidiously discriminatory animus," Griffin v. Breckenridge, supra at 101-02. The undisputed facts reveal no discriminatory animus whatsoever, and while the isolated incident of censorship may have violated the Communications Act of 1934, as amended, it did not constitute the denial of equal protection actionable under §1985(3). Even if it is assumed that the plaintiffs were discriminated against by the defendants, it is clear that defendants' actions were directed at them as individuals, and were not part of a general discriminatory pattern based on race or class.

2. Plaintiffs' have failed to allege the existence of a conspiracy with sufficient definiteness and clarity.

Plaintiffs' allegation that the defendants "conspired together" is totally inadequate in establishing the jurisdictionally requisite conspiracy for a §1985(3) action.

Section 1985(3) requires that the constitutional deprivations be the result of a conspiracy, and plaintiffs' complaint should be dismissed because it does not allege or establish facts "showing any of the essential elements of a conspiracy," Porter v. Bainbridge, 405 F. Supp. 83, 91 (S.D. Ind. 1975). In Davis v. Sprouse, the court dismissed a complaint which contained "a mere recitation of the juxtaposition of certain events which concurred or combined to cause damage to plaintiffs," 405 F. Supp. 45, 46 (E.D. Va. 1975). Kuczo and Nocerino's complaint merely states that "the three defendants conspired together and acted in concert..." (Complaint, ¶6).

While the complaint alleges that the plaintiffs were the victims of discrimination, there are no allegations that

are pleaded with any degree of particularity which demonstrate that the alleged discrimination was the result of a conspiracy. It is insufficient that a complaint sets forth "vague and conclusory allegations respecting the existence of a conspiracy," Powell v. Workmen's Compensation Bd. of State of New York, 327 F.2d 131, 137 (2d Cir. 1964); Valley v. Maule, 297 F. Supp. 958, 959-60 (D. Conn. 1968). Mere conclusory allegations do not raise a constitutional claim, Morgan v. LaVallee, 526 F.2d 221 (2d Cir. 1975), and "merely characterizing [defendant's] conduct as conspiratorial or unlawful does not set out allegations upon which relief can be granted." Dinwiddie v. Brown, 230 F.2d 465, 469 (5th Cir.), cert. denied, 351 U.S. 971 (1956). See also Blackburn v. Fisk University, 443 F.2d 121, 124 (6th Cir. 1971).

3. Even if the existence of the alleged conspiracy is pleaded with sufficient definiteness and clarity, the facts do not establish a conspiracy under §1985(3).

As the undisputed material facts presented in the accompanying affidavit and supporting documents indicate, plaintiffs have utterly failed to establish the jurisdictionally requisite conspiracy for a §1985(3) action.

A recent Connecticut case involving alleged racial discrimination by a private university held that, "Simply joining corporate officers as defendants in their individual capacities is not enough to make them persons separate from the corporation in legal contemplation. The plaintiff must also allege that they acted other than in the normal course of their corporate duties," Cole v. University of Hartford, 391 F. Supp.

888, 893 (D. Conn. 1975). Conspiracy in law requires two or more persons or entities. In light of the fact that a corporation can only act through its agents, the effect of a charge of conspiracy between Western and its President-Treasurer Gillespie and its Secretary-General Manager Schwartz is a charge that the corporation conspired with itself. See Dorsey v. Chesapeake & Ohio Railroad Co., 476 F.2d 243, 245-46 (4th Cir. 1973); Soloman v. Houston Corrugated Box Co., Inc., 526 F.2d 389 (5th Cir. 1976). Since Western could not conspire with Gillespie or Schwartz, neither of whom maintained a business identity separate from the corporation itself, plaintiffs' have failed to satisfy this requirement of a §1985(3) action. See New York Amsterdam Cheese Corp. v. Kraftco Corp., 363 F. Supp. 135 (S.D.N.Y. 1973); Milburn v. Blackfrica Promotions, Inc., supra at 436.

As noted in Cole, the leading case holding that a corporation cannot conspire with its officers and employees acting in their official capacities is Nelson Radio and Supply Co. v. Motorola, an antitrust case, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953), where the court noted that "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the [officers] are the acts of the corporation." 200 F.2d at 914. Nelson was first applied to a §1985(3) case in Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972). In his opinion for the court, Judge [now Justice] Stevens wrote:

> We believe that the statutory requirements that "two or more persons...conspire or go in disguise on the highway," is not satisfied by proof that a discriminatory business decision reflects the collective judgment of two or more executives of the same firm....[I]f

> the challenged conduct is essentially a single act of discrimination by a single business entity, the fact that two or more agents participated in the decision or in the act itself will normally not constitute the conspiracy contemplated by this statute.

459 F.2d at 196. See also Baker v. Stuart Broadcasting Co., 505 F.2d 181 (8th Cir. 1974).

The Complaint and the affidavit attached hereto both clearly indicate that plaintiffs' claims involve only a single business entity, Western, and center on a single act, Schwartz's policy to review candidates' scripts.

In the present case, plaintiffs have not indicated whether either Gillespie or Schwartz is joined as party-defendant in his individual rather than official capacity. The court in Cole, however, held that a corporate defendant could be a party to a conspiracy only if an individual who was an employee or officer acting for the corporation conspired with an employee or officer of the corporation who was acting in his individual capacity. Cole v. University of Hartford, supra at 892. The court also held that both corporate officers could be individually liable only if they conspired together in their individual capacities, and the corporation and both officers could not all have been parties to the conspiracy. Id.

The reasoning of Cole is applicable to the present facts and demonstrates that there could not have been a conspiracy among Western, Gillespie and Schwartz. Since Western could act only through an agent, it could not have been a party to a conspiracy if both Gillespie and Schwartz are joined in their individual capacities. If they are joined in their official capacities, then both acted on behalf of Western, and no

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conspiracy existed because Western could not conspire with itself.

Plaintiffs have not alleged nor would the facts support the conclusion that either Gillespie or Schwartz acted in his individual capacity. In the present case, the FCC expressly found that Schwartz's acts of censorship were not politically motivated but were instead designed "to maintain the station's image," 43 F.C.C.2d 730, 735, 737 (1973). Therefore, Schwartz was clearly acting in his official capacity as station manager. In Girard v. 94th St. and 5th Ave. Corp., the plaintiffs' 42 U.S.C. §1985(3) claim was dismissed because of the absence of allegations that the corporation directors were "actuated by any independent personal stake in achieving the purported illegal objective," 396 F. Supp. 450, 456 (S.D.N.Y. 1975), aff'd, 530 F.2d 66, 70-72 (2d Cir. 1976). Because the plaintiffs' complaint fails to allege that Schwartz had a personal stake in his actions, it is totally inadequate for showing the existence of a conspiracy involving Schwartz and Western.

On the facts, only if Gillespie were acting in his individual capacity while Schwartz acted on behalf of Western could there possibly be a conspiracy between Western and Gillespie. Plaintiffs have failed to allege nor do the facts establish any specific instances of discriminatory action where Gillespie acted in his individual or his corporate capacity or in which Gillespie and Schwartz conspired to discriminate against the plaintiffs, and there is no evidence whatsoever that Gillespie was involved in the censorship of plaintiffs' broadcasts in his individual capacity. Rather, the FCC found that Western was guilty of violating the Communications Act and FCC Regulations specifically because of Gillespie's failure to act, and because

of his reliance on Schwartz instead of direct supervision of the stations. 43 F.C.C.2d at 732.

Because of the evidence of Gillespie's inaction and his failure to question Schwartz's handling of the candidates, he could not have conspired with Schwartz in any capacity whatsoever. However, even assuming that Gillespie did conspire with Schwartz, who was acting for Western, Gillespie could only have been acting in his official capacity. Gillespie's decision to rely on Schwartz was certainly a business, not a personal, decision. The FCC held Gillespie vicariously liable for Schwartz's actions because Gillespie was President, Treasurer, majority stockholder and Director of the licensee, Western. This was clearly official, not individual, liability.

Viewing the facts in the light most favorable to plaintiffs, plaintiffs cannot prove the existence of a conspiracy violative of §1985(3). Both Schwartz and Gillespie could only have been acting in their official capacities on behalf of Western and could not have been parties to a conspiracy with Western or each other. Even assuming that plaintiffs were the victims of discrimination, because that discrimination could not have been the result of a conspiracy among the defendants, plaintiffs have no cause of action under §1985(3). As the court in Cole concluded, "[T]he only realistic target of [Kuczo's and Nocerino's] complaint is [Western] which allegedly discriminated against [them]...391 F. Supp. at 893.

4. Plaintiffs Have Failed To Show That They Were Denied Equal Protection Of The Law Or Of Equal Privileges And Immunities Under The Law.

In addition to the other infirmities of plaintiffs' §1985(3) claim, they have failed to show they were deprived

of those rights protected from conspiracies by this section of the Civil Rights Act, i.e., equal protection or equal privileges and immunities. See Griffin v. Breckenridge, supra at 102.

The privileges and immunities protected by §1985(3) are those privileges and immunities incident to United States citizenship, Miles v. Armstrong, 207 F.2d 284 (7th Cir. 1953); Arkansas v. Central Sur. & Ins. Corp., 102 F. Supp. 444 (D. Ark. 1952) enumerated in Footnote 4, supra. It is clear that plaintiffs are not, and could not be, alleging deprivation of these rights of national citizenship.

Thus, plaintiffs must demonstrate a deprivation of equal protection of the laws to entitle them to maintain a §1985(3) action as it is undisputed that this section does not apply to conspiracies to deny due process. Slegeski v. Ilg, 395 F. Supp. 1253, 1255 (D. Conn. 1975).[15/] However, as previously discussed, plaintiffs' failure to establish the existence of any state action is not only fatal to its Fourteenth Amendment claims but also to its §1985(3) claim based on a deprivation of equal protection of the laws protected by the Fourteenth Amendment.

In Dombrowski v. Dowling, 459 F.2d 190 (7th Cir. 1972), Judge [now Justice] Stevens, interpreting the reach of §1985(3) after Griffin, held that a showing of state action is a requirement of a §1985(3) claim predicated on a deprivation of Fourteenth

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15/ Another category of protected rights under the statute, recognized in Griffin v. Breckenridge, supra at 105, is those protected by the Thirteenth Amendment, which has never been interpreted as requiring state action. See Civil Rights Cases, 109 U.S. 3, 20 (1883). Plaintiffs have no cause of action under this Amendment.

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Amendment rights, though not required for claims based on the Thirteenth Amendment or the right to interstate travel. 459 F.2d at 195-96. See Bellamy v. Mason's Stores, Inc. (Richmond), 508 F.2d 504, 506-07 (4th Cir. 1974); Flores v. Yeska, 372 F. Supp. 35, 39-40 (E.D. Wis. 1974).[16/]

Finally, the deprivation of First Amendment rights does not fit into the "limited categories of private conspiracies" actionable under §1985(3), notwithstanding the questions of any state action or class-based discrimination. In Porter v. Bainbridge, 405 F. Supp. 83 (S.D. Ind. 1975) the court squarely held that "Section 1985 does not extend to conspiracies to deny... First Amendment rights of freedom of speech and assembly." 405 F. Supp. at 91. And in Bellamy v. Mason's Stores, Inc., supra the Fourth Circuit, presented with a First Amendment claim under §1985(3), concluded that the First Amendment was "framed as a prohibition against the federal government and not against private persons, and [that] the incorporation doctrine has never been extended by the Supreme Court to apply to private persons." 508 F.2d at 507. Clearly, plaintiffs' First Amendment claims are beyond the scope of §1985(3) and would, in any event, impermissibly extend the incorporation doctrine to wholly private conduct, because of the absence of state action.

16/ The Second Circuit's statement in Weise v. Syracuse University, supra that "§1985(3) embraces a limited category of private conspiracies, and that there is no state action requirement," 522 F.2d at 408, is neither compelling in the present case or dispositive of the court's interpretation of §1985(3). In Weise, the court neither discussed the three separate categories of protected rights identified in Griffin, see Dombrowski v. Dowling, supra at 195, nor engaged in the type of far-reaching legal analysis necessary to support such a conclusion, see Bellamy v. Mason's Stores, Inc. (Richmond), supra at 507.

CONCLUSION

Although plaintiffs' complaint is vague and conclusory to the point of being ambiguous, all the facts surrounding the 1969 mayoral campaign and Western's radio stations have been previously fully developed. The FCC hearings in 1971 elicited the sworn testimony of plaintiffs Kuczo and Nocerino, as well as that of a score of other witnesses including Kingsley Gillespie and Julian Schwartz. The entire matter was the subject of a lengthy Decision by the Hearing Examiner and subjected to full review by the FCC. Those decisions considered fully the testimony and exhibits presented by all parties to the proceeding. Thus, the present posture of this proceeding is very similar to a case where extensive pretrial discovery has been completed. In fact, the documents before the court relating to plaintiffs' allegations, presented with this Motion, not only present all material and relevant facts but have been additionally subjected to the truth seeking procedure of an adjudicatory proceeding.[17/]

This is clearly a case where summary judgment is proper. Rule 56(c) of the Federal Rules of Civil Procedure provides that

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17/ Both Kuczo and Nocerino have given sworn testimony concerning their treatment by WSTC in the 1969 mayoral campaign. Therefore, they simply cannot now contradict those sworn statements in an effort to raise an issue of fact. As the Second Circuit noted in an analagous situation:

> If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact.

Perma Research and Development Co. v. Singer Co., 410 F.2d 572, 578 (2d Cir. 1969).

summary judgment is proper when "there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law." A motion for summary judgment cannot be defeated by the hope that favorable evidence will be developed at trial, Erickson v. Said, 42 F.R.D. 170 (S.D.N.Y. 1970), or by the hope that there will be some "magical appearance at trial of genuine issues of material facts." United States Steel v. United States, 305 F. Supp. 497, 503

It is clear that plaintiffs must establish an issue of fact which is both "genuine" and material to defeat defendants' summary judgment motion. A material fact is one which affects the outcome of the litigation. To be considered "genuine" a material issue must be establish by "sufficient evidence supporting the claimed factual dispute...to require a jury or judge to resolve the parties' differing versions of the truth at trial." First Nat'l Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289 (1968). The evidence manifesting the dispute must be "substantial," Fireman's Mutual Ins. Co. v. Aponaug Mfg. Co., Inc., 149 F.2d 359, 362 (5th Cir. 1945), going beyond the allegations of the complaint. Beal v. Lindsay, 468 F.2d 287, 291 (2d Cir. 1972). Given the undisputed facts contained in the attached affidavit and supporting documents, including the sworn testimony of Messrs. Kuczo and Nocerino, plaintiffs cannot meet this burden, and judgment should be entered for defendants Western and Gillespie because it has been shown that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. Cruz v. Beto, 405 U.S. 319, 322 (1972).

Accordingly, Defendant's Motion For Summary Judgment should be granted.

Respectfully submitted,

Paul C. Jamison
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Stamford, Connecticut 06901
Attorney for Defendants
Western Connecticut Broadcasting Company and
Kingsley Gillespie

September , 1976

Of Counsel:

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Certificate of Service

This is to certify that copies of the foregoing "Motion For Summary Judgment," "Statement Of Facts In Support Of Summary Judgment Motion," "Memorandum Of Law In Support Of Defendants' Summary Judgment Motion," and "Affidavit of Kingsley Gillespie" were mailed, postage prepaid, on September , 1976 to the following:

LeoGold, Esquire
Mackler & Gold
589 Bedford Street
Stamford, Connecticut 06901

Sidney Vogel, Esquire
Hirschberg, Pettengill, Strong & Nagle
25 3rd Street
Stamford, Connecticut 06905

Paul C. Jamison

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs	)	
v.	)	Civil Action No. B-263
WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	)	

AFFIDAVIT OF KINGSLEY GILLESPIE

Kingsley Gillespie, being first duly sworn deposes and states as follows:

1. I am currently President, Treasurer, Director and majority stockholder of The Western Connecticut Broadcasting Company ("Western") a Connecticut corporation and held these positions in 1969. I have personal knowledge of the matters hereinafter referred to, and make this affidavit in support of Defendants' Motion For Summary Judgment.

2. Western is the holder of Federal Communications Commission ("FCC") licenses to operate radio stations WSTC and WYRS(FM) in Stamford, Connecticut. Western has been the licensee of WSTC since 1946 and the licensee of WSTC-FM since 1947. On February 19, 1974 the FCC granted a change of call letters from WSTC-FM to WYRS(FM).

3. Julian Schwartz was the Secretary and a Director of Western in 1969 and held these positions until December 4, 1970. He was also General Manager of WSTC and WSTC-FM in 1969 and held these positions until November 27, 1970.

4. During Mr. Schwartz's 23 years as General Manager of the radio stations, I met with him almost daily regarding the stations' operation. Although Mr. Schwartz had complete supervision of station programming, policies and personnel, I consulted with him on these matters and the final decisions on policy matters were mine. I had every confidence in him as a General Manager and in his ability to deal with political candidates and I did not deem it necessary to instruct him specifically on how to handle paid political announcements.

5. I was aware of his policy during the 1969 mayoral campaign of requiring candidates to submit their scripts to him before being broadcast, but I was not aware that this violated any regulation of the Federal Communications Commission or any federal statute. I was unaware, and a subsequent FCC decision so found, that Mr. Schwartz was requiring candidates to make revisions in the material prepared for broadcast in their own voice.

6. In 1969, the mayoral candidates in Stamford, Connecticut were three male caucasians, i.e., Julius Wilensky, Republican; Paul Kuczo, Jr., Democrat; and John J. P. Nocerino, Fusion Party candidate. Incumbent Mayor Bruno Giordano was defeated in the Democratic primary.

7. Mr. Wilensky won the general election by a plurality of 4,401 over Mr. Kuczo, out of 35,964 votes cast. Mr. Wilensky received 19,816 votes and Mr. Kuczo, 15,415. John J. P. Nocerino received 723 votes.

8. During the 1969 campaign all three mayoral candidates used the facilities of WSTC. Spot announcements and programs were purchased by all of the candidates. In

addition, each candidate provided the stations with news releases concerning their positions and activities.

9. Mr. Wilensky had no personal appearance program on WSTC, although some of the announcements might have utilized his voice. The announcements were prepared professionally with the assistance of one Lee Miller. Many of them were taped at the WSTC studios with the assistance of John Martin, one of the WSTC announcers, who was hired by the Wilensky campaign for that purpose. The campaign was charged regular rates for the production of these announcements. A study of station logs reveals that between September 29 and November 4 about 400 announcements were broadcast on behalf of Mr. Wilensky. "Friends of Wilensky" also purchased a one-hour special "Italian Melodies" program. This program was broadcast in English except for the Italian pronunciation of proper names. Mr. Wilensky did not appear on it.

10. Paul Kuczo purchased numerous schedules on WSTC. Between September 13 and November 4, 1969, about 600 announcements were broadcast on his behalf. For the most part, these were 60- or 10-second spots which did not utilize the candidates' voice. These spots were not prepared at WSTC. There were also a series of 5-minute political programs purchased by various individuals on which Mr. Kuczo did not personally appear. Mr. Kuczo did, however, personally use some air time.

11. Between September 8 and November 3, John Nocerino purchased a series of five-minute weekly programs on WSTC which

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were broadcast on Monday evenings. From September 8 - 29 these were broadcast at 6:24 PM. From October 10 through November 3 they were broadcast at 6:54. These programs were used by Mr. Nocerino personally. A total of 11 were broadcast.

12. During the 1969 campaign, I had no discussions with Julian Schwartz concerning his handling of any of the candidates' paid political announcements and I had full confidence that he was treating all candidates fairly and equally consistent with my announced instructions. He never informed me that he was requiring the deletion of material from the speeches of John J. P. Nocerino and Paul Kuczo and I never instructed Mr. Schwartz to treat Mr. Kuczo and Mr. Nocerino any differently than Julius Wilensky, the third mayoral candidate.

13. During this mayoral campaign, I did not speak to either John J. P. Nocerino or Paul Kuczo.

14. As a result of Julian Schwartz's substantive review of the Nocerino and Kuczo scripts prepared for broadcast in their own voice in the 1969 mayoral campaign, John J. P. Nocerino filed a complaint with the FCC. The FCC instituted a Show Cause proceeding which resulted in an Initial Decision in 1972 (certified copy - Attachment A) and a final Commission Decision in 1973 (certified copy - Attachment B). The Commission fined Western for violations of Section 315(a) of the Communications Act of 1934, as amended, as a result of the General Manager's, Mr. Schwartz's, review and alteration of the candidates' scripts. The Commission, however, ruled that Western's policy against back-to-baqk political ads which resulted in a change in the

placement of the Fusion party advertisements did not violate Section 315. The Commission also held that Schwartz's allowing supporters of the Republican candidate to have political announcements read by the regular announcer of the Italian Hour (a WSTC musical program) did not violate Section 315.

15. The Commission considered the motives of Julian Schwartz in reviewing the candidate's scripts and found that he was not politically motivated but rather was acting as General Manager of the radio stations to preserve their "image" in the community by applying a standard of "good taste."

16. I testified at the FCC hearings held in Stamford in October, 1971 as did Julian Schwartz, John J. P. Nocerino and Paul Kuczo, Jr.

Kingsley Gillespie
Kingsley Gillespie

Sworn to and subscribed before me this 23 day of September, 1976.

Luther R. Wright
Notary Public

My Commission expires April 1977.

Initial Decision

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

I, Vincent J. Mullins, hereby certify that the attached is a true and correct copy of the following document on file in this Commission, and that I am official custodian of the same:

Initial Decision of Hearing Examiner Isadore A. Honig, F.C.C. 72D-50, Issued: July 27, 1972; Released: August 4, 1972, In the matter of: Revocation of the Licenses of Western Connecticut Broadcasting Co. for Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM, Stamford, Connecticut, Docket No. 19043, 43 F.C.C. (2d) 752.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, this twenty-second day of July, 1976.

Vincent J. Mullins
Secretary

F.C.C. 72D-50

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSES OF WESTERN CONNECTICUT BROADCASTING CO. For Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM Stamford, Conn.	Docket No. 19043

APPEARANCES

Thomas H. Wall, *B. Dwight Perry*, and *Susanne Meyer*, on behalf of Western Connecticut Broadcasting Company; and *Gerald M. Zuckerman* and *Katherine Savers McGovern*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.[1]

INITIAL DECISION OF HEARING EXAMINER ISADORE A. HONIG

(Issued July 27, 1972; Released August 4, 1972)

PRELIMINARY STATEMENT

1. The Commission, on October 8, 1970, released its Order To Show Cause and Notice of Apparent Liability in this proceeding (FCC 70-1093). In that document Western Connecticut Broadcasting Corporation (Western), was directed to show cause why its licenses for Stations WSTC and WSTC-FM, Stamford, Connecticut, should not be revoked. It was further ordered that, in the event of a determination that the hearing record does not warrant revocation, it shall then be determined whether an Order of Forfeiture in the amount of $10,000 or some lesser amount should be issued.

2. The Commission's document (Para. 2) stated that information has come to its attention, since the last renewal of the licenses for Stations WSTC and WSTC-FM which raises the following questions:

(a) Whether the licensee censored material intended for broadcast over Station WSTC or WSTC-FM by legally qualified candidates for public office in willful or repeated violation of Section 315(a) of the Communications Act of 1934, as amended, and of Sections 73.120(b) or 73.290(b) of the Commission's Rules;

(b) Whether the licensee willfully or repeatedly failed to afford equal opportunities to all legally qualified candidates for the same public office in the use of its broadcasting stations, in violation of Section 315(a) of the Communications Act and Sections 73.120(b) and 73.290(b) of the Commission's Rules;

(c) Whether licensee willfully or repeatedly failed to maintain its station program logs, in accord with Sections 73.112 and 73.282 of the Commission's rules;

(d) Whether licensee willfully or repeatedly failed to maintain for public inspection a list of chief executives, officers or members of the executive committees or boards of directors of various committees that purchased time for

[1] *Melvin M. Dichter* appeared on behalf of Julian Schwartz, a witness in the proceeding.

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political programs as required by Sections 73.119(f) and 73.289(f) of the Commission's Rules;

(e) Whether during the Commission's inquiry into this matter the licensee misrepresented facts or was lacking in candor in responding to inquiries of the Commission;

(f) Whether the licensee possesses the requisite qualifications to remain a licensee of the Commission.

3. Western was directed to appear and give evidence in a hearing. The Commission further ordered that the Chief of the Broadcast Bureau serve upon Western a Bill of Particulars regarding the matters referred to in the above-listed issues. The Bill of Particulars was issued October 12, 1970.

4. Upon motion of Western, the Review Board, in a Memorandum Opinion and Order (FCC 70R-455), released December 30, 1970, added the following issue:

To determine whether the programming of Stations WSTC and WSTC-FM have been meritorious, particularly with regard to public service programs.

5. By Memorandum Opinion and Order (FCC 71M-280), released February 22, 1971, the Hearing Examiner denied a Petition to Clarify Issues, filed by Western on February 9, 1971, to permit adduction of evidence under issues (e) and (f), *supra*, relating to Julian Schwartz's general character and reputation for honesty and integrity. However, the Examiner also ruled that denial of the petition would not prevent the introduction of some limited amount of testimony relating to the general reputation of Mr. Schwartz [2] for truth and veracity in Stamford, if as a witness, his testimony were challenged or contradicted. An appeal from the Examiner's ruling on the petition to clarify issues was denied by the Review Board in a Memorandum Opinion and Order (FCC 71R-133) released April 21, 1971.

6. A petition for reconsideration of the Commission's action instituting the revocation hearing, which had been filed by Western on December 7, 1970, was denied by Memorandum Opinion and Order of the Commission (FCC 71-603) released June 15, 1971. During the pendency of the reconsideration petition, commencement of the hearing had been postponed by order of the Examiner (FCC 70M-1696), released December 11, 1970.

7. Prehearing conferences were held December 3, 1970 and July 16, 1971. Hearing sessions were held in Stamford, Connecticut on October 19 through October 22, 1971, and in Washington, D.C. on December 21, 1971,[3] with the record being closed on the last-mentioned date. Proposed findings of fact and conclusions were filed by the parties on April 3, 1972. Neither party filed a reply.

Stamford, Conn.

8. The city of Stamford, a community of 108,798 persons (1970 U.S. Census), is located in southwestern Connecticut on Long Island Sound, about 35 miles from New York City. As there was considerable evidence concerning political broadcasts directed toward Italian voters,

[2] Julian Schwartz was the manager of Stations WSTC and WSTC-FM from 1947 until November, 1970.

[3] By order of the Examiner (FCC 71M-1696), released October 27, 1971, the place of the hearing was transferred to Washington, D.C.

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it is pertinent to note that over 30 percent of the population is of Italian stock.

The stations involved

9. WSTC and WSTC-FM are the only stations licensed to Stamford. Western Connecticut Broadcasting Company, which was organized by Kingsley Gillespie in 1945, became the licensee of WSTC, by purchase, in January, 1946 and of WSTC-FM by original application, in 1947. The stations have since received license renewals regularly and they have never been fined. Except for technical matters discovered in routine inspections, they have never before been charged with violation of any Commission rule or statute.

Kingsley Gillespie and ownership of Stamford Media

10. Kingsley Gillespie is President, Treasurer and a Director of the licensee corporation; he has held these positions since 1946. Mr. Gillespie owns 51.6% of the corporation's stock personally. Gillespie Brothers, Inc. owns and publishes the *Stamford Advocate*, the city's only local daily newspaper. Mr. Gillespie, the President, Treasurer and a Director of Gillespie Brothers, Inc., is the publisher of the *Advocate*. This newspaper has been in the Gillespie family since 1867, and it is Stamford's oldest business enterprise.

11. Born in 1895, Kingsley Gillespie was 75 at the time of the 1969 mayoralty campaign and 76 at the time of the hearing. In 1969, Mr. Gillespie had his offices on the second floor of the newspaper offices at 258 Atlantic Street. The WSTC studios were located on an upper floor at 270 Atlantic Street. Mr. Gillespie did not have an office at WSTC's studios primarily because of lack of space there.[4] The two buildings housing the newspaper and the radio stations were about 200 feet apart. Mr. Gillespie did not visit the studios regularly because of his age and the climbing of many stairs required. He did meet practically on a daily basis in his own office with the general manager of the stations, Julian Schwartz, who was somewhat younger. The meetings varied from a few minutes to over half an hour. There were occasions on which Gillespie was too busy to see Schwartz. Schwartz would also telephone Gillespie to discuss matters that came up at the station. Gillespie also telephoned Schwartz, but not concerning happenings of the day on which he called. The purpose of the almost daily meetings between Gillespie and Schwartz was to discuss matters concerning the operation of the station such as programming and personnel. Schwartz would report problems to Gillespie and Gillespie would give Schwartz the benefit of his thinking on policy decisions. Gillespie set policy.

Julian Schwartz

12. At the time of the events which figured in the hearing the general manager of the Stamford stations was Julian Schwartz. He became associated with WSSR (now WSTC) in Stamford as a part-time newsman in 1942, was advanced to full time newsman and then was made the assistant manager. After the station was purchased by Western, Mr. Schwartz became general manager within a year after

[4] In July, 1971, WSTC moved its studios to a new location. Kingsley Gillespie did not have an office at the new studios as of October 19, 1971 because, as he explained, "We're really not settled completely yet."

that. As the general manager it was his duty to carry out the policies as set by Mr. Gillespie and he was in full charge of the stations' operations. There were many day-to-day problems he could and did decide himself. He served as general manager of the Stamford stations from 1947 until November 1970, when he was relieved and subsequently made sales manager, having served for an interval of about 10 days as news editor. During 1969, Mr. Schwartz was also secretary and a director of Western but he no longer holds those positions. He was 68 at the time of the 1969 mayoralty campaign and 70 when the hearing took place. At the time of the hearing Mr. Schwartz had been told that effective December 31, 1971, he must retire.

The censorship issue

A. *In General—*

13. Prior to 1969, Julian Schwartz was reviewing the scripts of of political candidates before broadcast (Tr. 72–73, 74–75; Western Ex. 2, p. 2).[5] According to Mr. Schwartz, the purpose of this review was to make certain that the text could be delivered within the time purchased and to insure that the material was in good taste (Tr. 136).[6] The standard for what constituted good taste was Schwartz's own (Tr. 76). He did not believe that a comment critical of someone was necessarily objectionable. In his view, material was not in good taste and was objectionable if it involved name-calling or a person's reputation, an exaggeration, or seemed otherwise objectionable.

14. Kingsley Gillespie was aware of Schwartz's policy of requiring candidates for political offices to submit their scripts of paid announcements for review by Schwartz before broadcast. Although Gillespie was not happy over the possibility of censorship,[7] he subscribed to the policy because he could think of no better solution to the problem of preserving the image of the station for good taste. He stated before the hearing that he was not aware this policy violated any Commission regulation or any federal statute (Western Ex. 2, p. 3), and he testified that he did not consider reviewing the scripts an act of censorship (Tr. 90). For, as he understood the law, a licensee could look at a candidate's scripts and attempt to persuade him to make changes in material which was not in good taste; however, if the candidate refused to make changes, the licensee had no power to require revisions. Gillespie instructed Schwartz accordingly and he stated that he thought they had an understanding that Schwartz would not exceed the bounds of general persuasion even if material was not in good taste. Gillespie testified that he did not discuss in detail with Schwartz how far he should go in attempting to persuade a candidate to revise material. Nor did he specifically instruct Schwartz as to what

[5] Apparently Schwartz did not consistently require all political candidates to submit scripts. Bruno Giordano, a Democratic candidate for mayor in 1967, testified that there were no set review procedures that year (Tr. 471–72). Paul Kuczo, who was defeated by Giordano in the 1967 Democratic primary, also testified that his scripts were not reviewed during that election (Tr. 317).

[6] Schwartz stated too that his motive was to protect the reputation of the station and to assist the candidates (Western Ex. 1, p. 4). Gillespie testified that one of the purposes of reviewing scripts "was to keep from destroying the image of the station that we had spent so many years building up." (Tr. 75).

[7] Gillespie testified (Tr. 89–90): ". . . I wasn't happy with the threat of censorship when you try to talk a man out of poor taste, but I certainly had the motive of keeping the broadcast in good taste."

constituted good taste, because after 25 years' experience with the man, he thought Schwartz knew what was in good taste and what was not. Gillespie testified that if Schwartz did require deletion of anything from candidates' material, it was done against his directions and without his knowledge (Tr. 72–76, 89).

15. Julian Schwartz testified that he was unaware his policy might have violated Section 315 of the Communications Act. Schwartz said he read a "catechism" issued by the National Association of Broadcasters which supported his belief. A portion of this document, entitled "Political Broadcast Catechism and Fairness Doctrine, 6th Edition" (Tr. 286), was read into the record by Mr. Schwartz:

> A. Question 67 is, "What can a station do if a candidate contemplates a speech including obscene or defamatory passages?" And the answer is, "Licensee should attempt to persuade" and persuade is in italics and, "candidate to delete it. However, if the candidate insists, the licensee under the no censorship provisions of Section 315 must allow the candidate to go on the air with his material uncensored." (Tr. 287).

Schwartz first read this "catechism" sometime in 1968. He testified that he would consider name-calling defamatory (Tr. 287).

16. Schwartz also testified that he read the Commission's document entitled "Use of Broadcast Facilities by Candidates for Public Office", published in May 1966. (Tr. 142–143) Question 7, Section 7 of that document reads as follows:

> Q. May a licensee, as a condition to allowing a candidate the use of its broadcast facilities, require the candidate to submit an advance script of his program?
>
> A. Section 315 expressly provides that licensees "shall have no power of censorship over the material broadcast under the provisions of this section." The licensee may request submission of an advance script, to aid in its presentation of the program (e.g., suggestions as to the amount of time needed to deliver the script). But any requirement of an advance script from a candidate violates Section 315. A licensee could not condition permission to broadcast upon receipt of an advance script, because "the Act bestows upon the candidate the right to choose the format and other similar aspects of the 'material broadcast', with no right of 'censorship in the licensee.'" (31 Fed. Reg. 6671) [Citations omitted]

Schwartz admitted he had read the Question 7 material quoted above prior to the 1969 mayoralty campaign (Tr. 144).

17. During the 1969 election campaign in Stamford neither Kingsley Gillespie nor Julian Schwartz had the advice of either local or Washington communications counsel with respect to matters relating to the Communications Act. Kingsley Gillespie kept himself informed in a general way on the contents of Commission regulations, but he placed complete reliance on Schwartz in this area (Tr. 686–87). Gillespie gave Schwartz only general instructions to comply with Section 315 and to treat all candidates fairly and equally (Tr. 68, 71–72, 139–40, 278–79).

18. The record establishes that during the fall of 1969 Julian Schwartz was under unusual stress. In addition to his habit of working seven days a week (he was usually at the station [6] Saturday morning and Sunday morning), and his reluctance to take a vacation, he par-

[6] The programming of WSTC is duplicated on WSTC-FM during major portions of the day, including those times relevant to the Section 315 inquiry. Therefore, reference to "the station" or "WSTC" is intended to refer to both stations.

ticipated in labor negotiations for the first time[9] (Tr. 99, 280); had to place his mother who had lived with him for 25 years in a rest home (Tr. 590, 598–99); and he experienced generally poor health (Pet., App. B; Tr. 590, 598–599). Dr. Saul Sherman, his personal physician, testified that he was under treatment for hypertension and gout (Tr. 590). During the latter part of 1969 he also suffered from angioneurotic edema and hives, which on one occasion caused him to lose consciousness (Tr. 591). Dr. Sherman attributed these latter maladies to anxiety and tension (Tr. 591, 598–99). Dr. Sherman stated that Schwartz had never before suffered anxieties to such a degree that they caused these physical manifestations (Tr. 594). He also testified that the physical and emotional stresses could have affected Schwartz's judgment and did in fact, cause him to be more irritable and upset (Tr. 592). Judge Maurice J. Buckley, who handled the labor negotiations (Tr. 621), testified that during this period Schwartz seemed high strung and became aggravated easily (Tr. 632). Judge Buckley has known Schwartz since 1924 (Tr. 621), had seen him at least monthly prior to the negotiations, and had always accepted Schwartz as "a cool, calm and collected gentleman" (Tr. 633).

19. Dr. Sherman also testified that these stresses might have caused lapses of memory in Schwartz (Tr. 593). Stress and preoccupation, the doctor said, affect the ability to concentrate so that events simply do not register in one's memory. Memory lapses are more common in people of advanced years, and that could be true of Schwartz. The doctor also said that lapses of this nature would be accentuated by unusual tensions (Tr. 600–602).

20. Stamford, Connecticut elects a mayor every odd numbered year. In 1969 the general election was preceded by a primary between two candidates seeking the Democratic party nomination. In the primary, which was held on September 25, the incumbent Democratic mayor, Bruno Giordano, was narrowly defeated by his challenger, Paul Kuczo. The Republicans did not have a primary contest but did nominate their own candidate, Julius Wilensky. There was also an Independent candidate, John Nocerino, on the election ballot on the Fusion Party ticket. Paid political announcements on behalf of all the candidates in the primary and general elections were broadcast by WSTC, the only broadcast facility (AM and FM) in Stamford.

Paul Kuczo, Jr.

21. Paul J. Kuczo, Jr., is a school teacher and has lived in Stamford for all of his 41 years. Mr. Kuczo entered and won the primary contest for the Democratic mayoralty nomination in Stamford in 1969. He defeated the incumbent, Bruno Giordano by six votes. Mr. Kuczo had first run for local office in 1958 and had sat on the Board of Representatives until 1967. He had entered the mayoral primary in 1967 and lost to Giordano. His 1969 bid to be mayor fell short when he lost the general election to the Republican candidate, Julius Wilensky.

22. Kuczo had purchased time on WSTC when he ran in the 1967 primary. During that campaign he dealt with Julian Schwartz, who

[9] The union was certified as the bargaining agent in August of 1969. Negotiations on the contract began in October, 1969 and ran through the spring of 1970 (Tr. 622).

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was then general manager of WSTC. The time Kuczo purchased in 1967 was used to broadcast paid political announcements that were made by the candidate. Kuczo would tape his spots at the station. His scripts were not reviewed by anyone at WSTC (Tr. 126–27, 315–18).

23. In his 1969 campaign Kuczo became a petition candidate in the Democratic primary election during the first week of September. Soon thereafter he purchased time on WSTC for the broadcast of paid political announcements. This time Schwartz instructed Kuczo that he would have to review all of the scripts before the tapes were made. Kuczo was informed, however, that in the event Schwartz was not at the studio to review the script, the tape could be made and Kuczo would be called on the telephone if any changes in the tape had to be made (Tr. 314–15, 317–18, 320–21).

24. Schwartz did not tell Kuczo why his scripts had to be reviewed and Kuczo did not protest when told of the requirement (Tr. 321–22). During the primary campaign Schwartz did not raise any problems with Kuczo's scripts (Tr. 319–20). After Kuczo's victory in the primary, he again arranged with Schwartz to purchase time on WSTC for the general election campaign. Schwartz repeated his requirement that scripts of paid political announcements were to be reviewed. Schwartz indicated that material which was not in good taste could not be taped. This time Kuczo objected to be required to bring his script to Schwartz every time and told Schwartz that he "did not like to be scrutinized" (Tr. 323, 326, 348).

25. Kuczo personally made approximately six tapes of paid political announcements during the general election campaign. On each occasion Schwartz told Kuczo when to appear at the WSTC studio with his script—and on each occasion Schwartz reviewed Kuczo's script (Tr. 327–28). As far as Kuczo was concerned, the review by Schwartz of his scripts was not of major concern until the last week of the campaign. Until then, Schwartz would point out those portions of the scripts which he considered to be in "bad taste." Kuczo did not protest deletion of the material because he did not consider the material in question to be important (Tr. 348). He did, however, tell Schwartz that as far as he was concerned there was nothing wrong with the material (Tr. 329–30).

26. Mr. Kuczo particularly recalled one occasion when the deletion by Schwartz of material from a script lead to emphatic disagreement on the part of Kuczo. He had prepared the text of what was to be his final appearance on WSTC, the night before election day. As usual, the script was reviewed by Schwartz. The script was seven typewritten pages long. Schwartz began by reading through the script. When he reached page 6 he crossed out the following paragraph:

> One issue that the Republican candidate found most embarrasing (sic) was his record with his own company—his present employer—since the company had closed down and left Stamford after labor troubles—the Republican candidate was a member of management at the time and had compiled a poor record of popularity with the labor representatives. When a former shop steward brought out some of his activities, a considerable segment of the electorate was put beyond his reach. He knew this and avoided mentioning labor like the plague.

Schwartz deleted the paragraph by placing "X" marks through the text. He told Kuczo that the speech was not be be broadcast with that material in it (Bureau Ex. 1, p. 6; Tr. 329–31, 334–35).

27. There was no discussion between Schwartz and Kuczo before the paragraph was deleted. After Schwartz crossed out the material, however, Kuczo told him that he had a "hell of a nerve" because there was nothing wrong with the material. Schwartz was adamant—he told Kuczo that the paragraph was a "personal attack" and that the speech would not be broadcast unless the paragraph was deleted. Kuczo had wanted to show that his opponent had compiled a poor labor record—the paragraph in question was the only portion of the script which made reference to that aspect of the campaign (Tr. 336–37).

28. When Schwartz reached page seven of the script he crossed out four names. Kuczo had used the names in referring to a "clique" which he claimed controlled the community. Kuczo again argued with Schwartz and again was told that he either accede to Schwartz's directions or the script would not get on the air (Bureau Ex. 1, p. 7; Tr. 346–48).

29. After having read the entire script through once, Schwartz went over it again with Kuczo. Schwartz objected to additional sections and they were deleted by Kuczo. Kuczo had just had a major disagreement with Schwartz during which he had been threatened with not being able to broadcast his script. By this point when Schwartz made "suggestions" Kuczo did not know whether he would be able to broadcast if he did not follow the suggestions made by Schwartz. Kuczo was anxious to make his tape—he did not want to argue further with Schwartz (Tr. 343–44, 338). Schwartz objected to three lines on the third page of the script and Kuczo deleted them (Tr. 333–34, 338). Schwartz objected to Kuczo's inclusion, on page 5 of the script, of the same names he had already deleted from the seventh page. Kuczo explained to Schwartz that the people mentioned were known to the voters and were supporting his opponent. Schwartz replied that he did not want Kuczo to mention people who were not in the election. Kuczo, not wanting an argument, crossed out the names (Tr. 342–44). Finally, Kuczo's script contained a statement that Wilensky had done something that made it seem that he, Wilensky, was "opposed to the fundamental virtues of our Republic." Schwartz objected and Kuczo crossed out the passage (Bureau Ex. 1, p. 6; Tr. 345–46).

30. Julian Schwartz was handed a copy of Kuczo's script (Bureau Ex. 1) at the hearing. He was specifically referred to the crossed out material on the sixth page. Schwartz could not recall having seen the script previously, although he stated he must have seen it (Tr. 147–48). Nor did he remember crossing off the paragraph on page 6 of Kuczo's script (Tr. 147). He admitted that he had reviewed the Kuczo scripts to make certain they were in good taste and without name-calling. At times, he said, Kuczo tended toward name-calling. Schwartz testified that in all cases Kuczo accepted his suggestions (Tr. 255–256). He denied ever threatening Kuczo or any other candidate use of facilities if there was a refusal to accept his suggestions (Tr. 145–46). Schwartz stated that he "may have insisted" upon deletions but he had not "necessarily enforced the insistence" (Tr. 145). However, Mr. Kuczo's

much more positive recollection of the details of the incident and Schwartz's concession that he may have insisted upon the deletions leaves no room for doubt that Kuczo's testimony is entirely credible and that Schwartz's denial of the threat made to Kuczo cannot be believed. Reliance upon Kuczo's credibility has led to the findings based on his testimony reached above.

Bruno Giordano

31. Bruno Giordano was mayor of Stamford from December, 1967 to November, 1969. He now publishes a weekly newspaper in Stamford. In 1969, Giordano, as the incumbent mayor was opposed by Paul Kuczo in the Democratic primary. During the primary campaign Giordano purchased time on WSTC from Mr. Schwartz for political announcements. Most of Giordano's appearances were by tapes which he recorded at home. These tapes were not reviewed by Schwartz prior to broadcast. On those occasions when Giordano went to the studio with his script, Schwartz reviewed the material and suggested changes. Schwartz did not instruct Giordano that his scripts were to be reviewed. Giordano regarded the review as standard procedure. Giordano discussed the suggestions with Schwartz and at times disagreed with him—Schwartz found portions of the scripts to be too strong. Although there were disagreements, Giordano always gave in and accepted the suggestions. Giordano felt that if he did not agree with Schwartz there would be repercussions if Giordano failed to go along with his suggestions (Tr. 470–78, 480–83). There is no evidence that Giordano complained about the review of his scripts by Schwartz to Kingsley Gillespie.

John Nocerino

32. John Nocerino has an insurance agency, is a real estate developer and a Methodist lay preacher. In 1969 he formed the Fusion party and ran for mayor of Stamford as an Independent. He had never previously run for office. Nocerino became a candidate in late August. Shortly thereafter, he began broadcasting five-minute paid political announcements on WSTC on Monday evenings. Nocerino's dealings at WSTC were with Julian Schwartz. At the very beginning, Nocerino told Schwartz that he would be using his five-minute spots and appearing personally to air his broadcasts. Schwartz indicated that he would have to approve all of Nocerino's scripts prior to broadcast to make sure that they did not contain any libelous material, racial slur or things of that nature. In order to provide sufficient time to review the scripts, Nocerino was told to arrive at WSTC's studios between 3:00 and 4:00 in the afternoon, although his spot was scheduled for 6:25 in the evening (Tr. 385, 394–98).

33. Although Nocerino did not run in a primary election, he was broadcasting paid political announcements during September when Kuczo and Giordano were campaigning for the Democratic nomination. Nocerino made three or four Monday evening broadcasts prior to the Democratic primary. In each instance, Schwartz reviewed his script prior to broadcast. During his review of those first few scripts, Schwartz merely corrected Nocerino's grammar and deleted some

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words he regarded as being in bad taste; the candidate accepted the corrections without objection (Tr. 394, 399, 452).

34. After the primary, Nocerino's five-minute Monday evening broadcast was moved from just prior to the 6:30 P.M. local news program to just prior to the 7:00 P.M. network news. He continued the practice of arriving at the WSTC studio early so that Schwartz could review the script for that evening. After the primary, however, Schwartz's reviews took on a different character (Tr. 399, 400-03, 414-15). In Nocerino's words, "now the changes became a little stronger than they were before" (Tr. 403).

35. The following incident illustrates the more stringent approach taken by Schwartz in reviewing Nocerino's scripts. In the script which Nocerino had prepared to be broadcast on October 13, 1969, the following paragraph appeared: (Bureau Ex. 2, p. 2)

> **If Mr. Wilensky is the big business executive he claims to be why did he not, as a member of the Board of Finance, head off the bond issue fiasco which lost us over $600,000 of need (sic) money. The first issue was sold without informing the bond buyers that a law suit was pending against part of the money. An illegal act! Why did Mr. Wilensky keep silent while the bonding was in process and again when Mr. Brant soft peddled the tax payers loss. Both Mr. Wilensky and Mr. Brant were warned at a meeting of the Board of Finance by Mr. Warren Knapp and Mr. Edward Scofield that the issuing of the bonds with a law suit pending was illegal. Neither Mr. Knapp or Mr. Scofield are the big executives that Mr. Wilensky claims to be.**

Schwartz placed an "X" through the entire paragraph. Nocerino asked him why he was deleting the section. Schwartz replied that the contents of the paragraph were untrue. Nocerino argued that he had gotten the facts from the *Stamford Advocate* and that it was his speech and not Schwartz's—that he had a right to bring out the facts. Schwartz insisted that the paragraph was not true. Either the paragraph was to be deleted or you don't go on, he told Nocerino (Tr. 405-07). Because Schwartz had reduced the length of the script, Nocerino rewrote his speech. The replacement script was reviewed by Schwartz who crossed out the words "no wonder" as being in bad taste (Bureau Ex. 2(a), p. 3; Tr. 415-16). Nocerino did not voice an objection when Schwartz deleted the words from the rewritten script. It was getting close to broadcast time and he was apprehensive because Schwartz's attitude had changed (Tr. 417). Nocerino testified: "I felt that if I was going to get on the air at all, I better not say another word." (Ibid)

36. Schwartz recalled that an FCC investigator showed him the original October 13 script (Bureau Ex. 2), which Nocerino subsequently rewrote. He did not remember seeing it during the campaign but agreed that he probably reviewed it with Nocerino since he had reviewed all the scripts. Schwartz indicated that he might have crossed out the paragraph quoted above, or Nocerino might have done it at his suggestion (Tr. 159-54).

37. In the script he prepared for broadcast on October 20, 1969, Nocerino referred to someone as a "rather unimpressive" Kuczo captain. Schwartz deleted the quoted words, telling Nocerino that they were not necessary. Further along, Nocerino had referred to something this individual had done "in his obvious ignorance." This too was deleted by Schwartz as being in bad taste. He ignored Nocerino's

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questioning this deletion. Nocerino's script referred to the "level of their mentality" (of Kuczo supporters). The phrase was deleted by Schwartz. In the same script, Nocerino had written that a Kuczo supporter had been required to read a speech that "reeked of gutter-type politics." "Just how desperate is Mr. Kuczo?", Nocerino asked. Schwartz deleted the entire reference as being unnecessary (Bureau Ex. 3, pp. 1-2; Tr. 418-23).

38. Schwartz recognized the October 20, 1969 script as being Nocerino's but had no specific recollection of its contents. He agreed that some of the cross-outs on the script looked like his handiwork. Schwartz did not specifically recall crossing out or objecting to the "reeked of gutter-type politics" section but indicated that his reading of the section on the witness stand lead him to the conclusion then that the section was in poor taste (Tr. 155-59).

39. Nocerino's last appearance on WSTC during the 1969 campaign was on November 3. Once again, Schwartz reviewed his script. Nocerino had wanted to state that Kuczo had "spent an estimated $70,000 to try and change his image." Schwartz crossed out that statement, saying that it was not true. Nocerino told Schwartz the information was received from a reliable source and he felt it was true. Schwartz replied that the statement had to come out. A few sentences later, Nocerino wrote (referring to Kuczo) "How can anyone be in public life so long and accomplish so little." Schwartz crossed it out.[10] Nocerino did not feel arguing was of any use (Bureau Ex. 4, p. 2; Tr. 424-25).

40. In his November 3 broadcast, Nocerino wanted to state that Kuczo had been rejected by the local labor council because of his affiliation with a named Senator whom, according to Nocerino, the union presidents attending a Stamford labor council meeting considered to be anti-labor. Schwartz crossed out the reference to the affiliation with this Senator, saying that it was poor taste to refer to the Senator since he was not involved in the campaign. Nocerino objected. Schwartz told him the reference was out or else Nocerino would not be going on the air (Bur. Ex. 4, p. 2; Tr. 426).

41. Later in the script Nocerino wrote that Wilensky "no doubt will support big business." Schwartz crossed out the statement, saying it was not necessary. Nocerino's script originally stated that he could not accept anything that Wilensky said without a grain of salt, and that the public had seen Wilensky lose his cool more than once at public forums. Both those sentences were deleted by Schwartz because, in his opinion, they were not important (Bur. Ex. 4, p. 3, Tr. 428).

42. Schwartz testified in greater detail about the November 3 script than any of the others. He found that Nocerino's reference to Kuczo spending $70,000 was in poor taste because it was an exaggeration—Schwartz knew that Kuczo did not have $70,000. If Nocerino had written that Kuczo spent $30,000, the section might not have been deleted. Schwartz agreed that he might have personally crossed out the $70,000 section. He did not remember if Nocerino argued against deletion of the material (Tr. 160-63). Schwartz acknowledged that there were other portions of the script which he could have crossed out and "probably did." The language concerning Nocerino's not accepting Wilen-

[10] According to Nocerino, the comment made by Schwartz was that this statement "was improper or irrelevant" or something like that.

sky's statements without a grain of salt and the statement that Wilensky lost his cool at public forums were objectionable because they were "personal attacks" on Wilensky and, therefore, not in good taste [11] (Tr. 165, 167–68).

43. Schwartz recalled objecting to Nocerino's statement "How can anyone be in public life so long and accomplish so little." He objected to the sentence (and either crossed it out or had Nocerino cross it out) because he "thought it was a slap at Mr. Kuczo." Not all "slaps" are objectionable. It depends on what the "slap" is about. Schwartz did not think that this "slap" intimating that Mr. Kuczo had done nothing or very little in public life was in good taste (Tr. 162–63). Nocerino's mention of the Senator was also regarded by Schwartz as being in "poor taste". Schwartz agreed that he probably crossed out that section but he did not remember any particular argument with Nocerino about it (Tr. 164–65).

44. On November 3, when Nocerino broadcast his last paid political announcement of the campaign he brought with him an addendum to the script. He did not show Schwartz the addendum. When he came to the end of his script he read the addendum which was a short statement indicating, among other things, that the Fusion party intended to file a complaint against WSTC with the FCC for illegally censoring its candidate and for discriminating against citizens of foreign language minorities (Bur. Ex. 5, p. 2; Tr. 443). Schwartz did not learn of Nocerino's surreptitious finale until the next morning when he saw a copy of the addendum (Tr. 184–85). He obtained this copy from the news room of the station where Nocerino had left it on a desk after his broadcast of the previous evening (Tr. 185). On November 4, 1969, after seeing the addendum Schwartz dictated a memorandum stating that the additional material "was announced after Mr. Nocerino had completed reading a five minute script which had been approved by the Station Manager. No authorization was asked for this announcement." (Bur. Ex. 5, p. 1; Tr. 185). Schwartz informed Gillespie about the addendum the morning he found out about it (Tr. 185).

45. On a number of occasions Nocerino arrived at the station late when Schwartz was not there. At such times Nocerino was required to read his scripts over the telephone to Schwartz. It was the general practice for Schwartz however to read the scripts of the candidates in the 1969 mayoral election in their presence at the station (Tr. 136).

46. Schwartz testified that he reviewed Kuczo's and Nocerino's scripts to make certain that they were in "good taste". A script was in good taste if there was "no name calling" and "no one's reputation was involved." Schwartz had some difficulty explaining in detail what he meant by his reference to "reputation" but gave "calling them names or referring to them as so-and-so's or liars" as examples (Tr. 137–38, 255–56).

47. In testifying, Schwartz could not remember any instances of either Nocerino or Kuczo insisting that material remain in a script over his objection. According to Schwartz, any material which was deleted from Nocerino's or Kuczo's scripts, was with the concurrence of

[11] Schwartz acknowledged that certain "personal attacks" could be in good taste but was unable to say what distinguishes one that is in good taste and one that is in bad taste without having a specific example before him (Tr. 168).

the candidates (Tr. 139). Schwartz acknowledged that there were times when Nocerino became angry because of his objections but that in almost all instances he was able to convince the candidate that the objectionable material should be deleted. Although he could not remember them, Schwartz conceded there may well could have been instances when he was not able to convince Nocerino and the candidate was permitted to broadcast the material (Tr. 165–67). According to Schwartz, he was more persuasive with Kuczo. He would point out the objectionable material and tell Kuczo that he would prefer that the material not be used. Kuczo always agreed (Tr. 255–56). According to Schwartz, if a candidate insisted that objectionable material was not to be deleted, he was permitted to leave the material in the script. (Tr. 138). Mr. Nocerino's forthright manner of testifying and his ability to readily recall the details of the review of scripts by Schwartz made him a more credible witness and his insistence that he deleted material under open threat by Schwartz had a ring of truth to it which was not matched by Schwartz's denial on the stand.

GILLESPIE'S KNOWLEDGE RE 1969 CENSORSHIP

48. Mr. Gillespie has maintained that if Schwartz deleted anything from paid political announcements of candidates over their objections it was done contrary to his directions and he knew nothing about it (Tr. 73). He testified that he first became aware that there had been a confrontation between Schwartz and a candidate when he learned of Nocerino's addendum the day after it was broadcast (Tr. 74). Gillespie further testified that prior to this incident, no candidate had ever complained his political announcements were being censored, so far as Gillespie knew (Tr. 74). Gillespie stated too that before 1969, to the best of his knowledge, Schwartz had always been successful in persuading the candidates, in cases where it was necessary, to keep the text of their scripts in good taste (Tr. 75).

49. Gillespie was aware before 1969 that Schwartz was reviewing the scripts of political candidates (Tr. 75).[11a] He had instructed Schwartz if the latter was unsuccessful in dissuading a candidate from broadcasting something Schwartz believed to be in bad taste, he had to back away and let the candidate do it (Tr. 76). Gillespie testified that when he learned Schwartz had required deletions from candidates' scripts in the 1969 election campaign he (Gillespie) "was more than surprised". He "was shocked". Gillespie stated that the question had never come up in the mayoralty election campaigns of 1967 or 1965 or 1963 (Tr. 74).

50. Schwartz testified that during the 1969 campaign he mentioned to Gillespie that he was having "difficulties" with Nocerino's paid political announcements but that he did not go into any great detail (Tr. 169). But then Schwartz explained in the following colloquy (Tr. 169–70):

Q. What difficulties did you describe to Mr. Gillespie, if any?

A. Only in connection with the political broadcast and that Mr. Nocerino objected to some of the changes that I made and that was it.

[11a] Gillespie had told Schwartz in the late 40's, and they had an understanding, that Schwartz "has a right to look at the scripts and suggest to the candidate what was not in good taste, but he had no power to force [the candidate] to change it" (Tr. 75).

51. In Schwartz's testimony the next day touching on his almost daily meetings with Gillespie, he described the discussions he had with Gillespie during the 1969 political campaign (Tr. 249–253). Schwartz gave Gillespie the names of those who had purchased time for political announcements. He also told Gillespie there were some problems with some of these candidates and he was taking care of it. Schwartz did not go into the details of the problems or of how he was dealing with them. Schwartz further informed Gillespie that Kuczo and Nocerino had complained about WSTC's news coverage. Gillespie was informed that Nocerino had purchased five minutes on Monday evenings for paid political announcements. He asked Schwartz how things were going along with Mr. Nocerino. Thereupon Schwartz replied as indicated in this following testimony:

> I told him I had made some changes in Mr. Nocerino's political broadcasts, that I didn't think they were in good taste and that was it.

In response to the question whether Gillespie had asked how Nocerino reacted to these changes, Schwartz stated: "He probably did, but I don't remember specifically."

52. Earlier, Gillespie had testified that during the mayoral campaign Schwartz complained that he was having problems with Nocerino, among them that Nocerino had been asked to be at the studio at 4:00 so that his script could be reviewed for his 6:25 broadcast for length and good taste, but was showing up shortly before air time (Tr. 86–87). Schwartz had a second complaint about Nocerino. When Nocerino was late, and arrived at the studio after regular business hours, the news staff had been instructed to call Schwartz at home and have Nocerino read the script to him over the telephone. Schwartz complained to Gillespie that he coud not delete any parts of the script over the telephone (Gillespie's own words) (Tr. 86–87, 400). In this connection, Gillespie testified he was told by Schwartz that his deletions or his changes were always persuasive and were directed toward the final result being in good taste (Tr. 87). Gillespie was not happy with the procedure of having the scripts read over the telephone but could not think of a better solution to the problem occasioned by Nocerino's tardiness (Tr. 88).[12]

53. Gillespie testified that Schwartz had reported to him about the broadcast of Nocerino's addendum. According to Gillespie, Schwartz told him in general terms that Nocerino had declared he was going to complain to the FCC "about his scripts being either edited or changed." (Tr. 79). At this point Gillespie could not say whether he asked Schwartz for any explanation:

> Q. Did you ask Mr. Schwartz whether Mr. Nocerino's speeches had been edited and changed?
>
> A. I can't remember whether I asked him or not (Tr. 79)

Several transcript pages later, Gillespie mustered a "vague recollection" of asking Schwartz what the facts were regarding Nocerino's complaint but, he added, both he and Schwartz were unable to deter-

[12] In light of Gillespie's definite recollection of Schwartz's complaint to him about Nocerino's tardiness in arriving at the studio, Schwartz's testimony (Tr. 300) that he did not report to Gillespie that Nocerino was some times late may be attributed to faulty recollection.

mine whether the accusation was true because Nocerino's scripts were not available.[13] Gillespie did not contact Nocerino directly (Tr. 84).

54. The day after his October 13 broadcast, Nocerino telephoned Gillespie at the Stamford *Advocate*. He was disturbed about Schwartz having deleted material from his script and believed he was being treated unfairly. He wanted to complain to Gillespie. He telephoned Gillespie a second time before going on the air after he had been told by Schwartz that certain material was either coming out of his script or he would not be permitted to broadcast. Both attempts to speak to Gillespie were unsuccessful. Nocerino was told that Gillespie was not in. On both occasions he left his name and telephone number and asked that Gillespie return the call. Nocerino's calls were not returned (Tr. 445–50). Gillespie testified that he never received a message to call Nocerino. Further, he stated that his secretary could not recollect receiving any phone calls from Nocerino (Tr. 690–91). When he is away from the office, a memorandum of each phone call made to him is prepared by his secretary. Gillespie did not remember having seen a memorandum indicating a call from Nocerino (Tr. 691–92).

55. As early as 1968 a candidate for public office in Stamford voiced objections more than once to Mr. Gillespie personally over Schwartz's treatment of his scripts prepared for paid political announcements (Tr. 507, 510, 519, 538, 540). The complaining individual was Mr. Ralph Sheldon who has run in primary elections in Stamford on several occasions (Tr. 491, 520–21).[14]

56. During the campaign, Sheldon purchased more than $500 worth of time on WSTC, including ten 5-minute spots (Tr. 500). Schwartz reviewed Sheldon's scripts and required him to make changes. Schwartz made notations on Sheldon's scripts and told the candidate what he could and could not say. Schwartz also took scripts from Sheldon and returned them the next day with changes (Tr. 495–98, 508–09). He explained to Sheldon that the material in the scripts had to be shown to Gillespie and the station's attorneys for approval (Tr. 508).

57. Sheldon objected to Schwartz's practice of requiring changes in his scripts. He told Schwartz that he was purchasing the time and did not want Schwartz to interfere with his "ideology". Sheldon argued with Schwartz but would usually comply with Schwartz's demands "under protest". He told Schwartz that he disagreed with the changes made in the scripts but went along with them because he wanted to get whatever he could on the air (Tr. 497–99, 504–05). Schwartz had instructed Sheldon that he could not broadcast material that was in bad taste. However, when Schwartz reviewed the scripts he did not object on that basis, but instead eliminated material he claimed would subject the station to law suits (Tr. 498–99).

58. During his campaign for the Democratic nomination for Judge of Probate, Sheldon made an appointment to see Kingsley Gillespie

[13] Gillespie asked Schwartz to try to get the Nocerino scripts and recalls Schwartz reported that his attempt was unsuccessful because he was denied them (Tr. 85).

[14] Testimony by Sheldon was not received as evidence of Section 315 violations but for consideration with regard to the misrepresentation issue and Gillespie's knowledge as to previous instances of censorship by Schwartz before 1969 (Tr. 116–17).

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whom he knew to be the owner of WSTC. Schwartz was also at the meeting which lasted 5 or 6 minutes. Sheldon complained that Schwartz was interfering with the expression of his ideology and that he wanted more freedom of speech.[15] Gillespie informed Sheldon that his complaints had to be handled by Schwartz because the radio station was a completely separate organization from the newspaper. During the meeting, at which Schwartz mentioned that broadcasts had to be in good taste with no name calling, Sheldon argued that a radio station could not be sued for something he might say as a candidate (Tr. 510–11, 534–40).

59. Later in 1968, Sheldon again was a candidate in a primary election. This time he was seeking the nomination for State Senate. Once again he bought time on WSTC in order to personally deliver political announcements. His appearances were fewer, however, having purchased approximately $80 worth of time. Sheldon's scripts were again reviewed by Schwartz. Sheldon wanted to refer to organized crime and the Mafia. Schwartz did not allow him to do so and crossed out the material. Sheldon argued that the material was not objectionable. Schwartz told him that the FCC Rules prohibited the broadcast of that type of material and that if it were broadcast the station could be sued and lose its license (Tr. 515–18).

60. Sheldon made several visits to Gillespie's office during the State Senate primary campaign. He was usually informed that he could not see Gillespie. Once or twice, however, he stuck his head in the door and complained that Schwartz was censoring his paid political announcements and new releases. Gillespie referred Sheldon to Schwartz (Tr. 518–19, 541).[16]

61. Schwartz recalled that Sheldon ran in the primary for the Judge of Probate in February 1968 and that he purchased time on WSTC for personal appearances. Schwartz indicated that he reviewed Sheldon's scripts to insure that they were in good taste, contained no name-calling and were within the time limits of the spot purchased (Tr. 265–66). When Schwartz found objectionable material in Sheldon's scripts he would "suggest" to Sheldon that it be deleted. Schwartz testified as to Sheldon's reactions:

Q. He followed your suggestions?
A. He usually did.
Q. Sometimes he didn't?
A. He didn't like it, but he took it out (Tr. 268).

* * * * * * *

Q. Did he complain to you about having to delete material from his scripts?
A. Yes, he complained at first, but then after I talked to him he went along (Tr. 269).

[15] No documentary evidence was introduced to show the changes which Schwartz made or required to be made in Sheldon's scripts. The record does not reflect that Gillespie saw any of the Sheldon scripts either before or after the changes made in them. While Sheldon answered "Yes" when asked if he specifically told Gillespie that Schwartz was requiring him to "delete" material, the Examiner is unable to find from a careful review of Sheldon's testimony (Tr. 525–540), that he either specifically or in substance informed Gillespie there were deletions. The absence of Sheldon's scripts or testimony of specific examples cited in the meeting with Gillespie compounds the difficulty in this respect. Although Sheldon testified "in essence" or "in substance" Schwartz was requiring deletions (Tr. 538), when pressed for specifics (Tr. 538–39), the witness did not substantiate these characterizations.

[16] Sheldon ran for office again in 1971. This time his scripts were not reviewed by WSTC personnel (Tr. 521).

62. Schwartz testified that he had persuaded Sheldon to remove material from his scripts and had told Sheldon the offensive material was in poor taste and not in his own interest. Schwartz also told Sheldon all he was trying to do was to improve what Sheldon was going to say (Tr. 269). Schwartz further testified that although he reported to Gillespie that Sheldon had purchased time on WSTC, he did not discuss the candidate's scripts (Tr. 271–72). Instead Schwartz described to Gillespie Sheldon's antics when he came to the studio to buy time.[17] Schwartz stated that he had never seen Sheldon in Gillespie's office (Tr. 272).

63. Gillespie denied that Sheldon ever complained to him about Schwartz censoring his announcements delivered over the station in his own voice (Tr. 114, 188, 693). Nor, so Gillespie testified, did Schwartz report to him in 1968 that Sheldon had complained he was not being permitted to say what he wished to say in paid political announcements (Tr. 118). According to Gillespie, he (Sheldon) would simply drop in unannounced. On one occasion he wanted to read his latest poem. On another Sheldon read something written by him attacking all the lawyers in Stamford. On still another he complained of how his grandfather's estate was inordinately reduced by a local law firm. He would sometimes do push-ups (Tr. 692–93). Sheldon would normally stay two or three minutes, Gillespie said, although it might have seemed longer (Tr. 693–94).[17A]

64. Mr. Sheldon testified at a rapid rate. He admitted that he had done "flying pushups" at Station WSTC and, in his words, "We had a lot of fun." Notwithstanding these circumstances, on the witness stand, Sheldon impressed the Hearing Examiner as being most serious in delivering his testimony and as being a credible witness. Thus the Examiner finds no reason to take Sheldon's testimony lightly or to question his credibility. He evinced a ready recollection of events about which he testified and in any instance where he differed with Mr. Schwartz, whose recollection in general was not as certain, the Examiner prefers to accept Mr. Sheldon's testimony as more reliable.

65. Again, Sheldon's unhesitating recollection of pertinent incidents makes his testimony preferable to that of the less convincing Mr. Gillespie in resolving the conflict between them. Hence, despite denials by Schwartz and Gillespie, the Examiner is constrained to find that Sheldon had complained to Gillespie of censorship by Schwartz and that Schwartz was present when Sheldon had a five-minute conference with Gillespie in the latter's office.

EQUAL OPPORTUNITY

66. Peter Halladay is an announcer-technician at Station WSTC. He recalled that during the 1969 campaign Schwartz instructed him that if Nocerino or Kuczo came to the station with scripts of paid political announcements they were not to be permitted to broadcast until the scripts were reviewed and approved by Schwartz. Halladay asked Schwartz what he should do about Julius Wilensky, the Re-

[17] Schwartz reported that Sheldon came into the studio, stood on his head and did standups with his hands while reciting poetry (Tr. 271).

[17A] As shown by Gillespie's testimony (Tr. 692), Sheldon appeared at his office frequently.

publican mayoral candidate. Schwartz said: "We don't have to worry about him" (Tr. 489–90). In a December 4, 1970 affidavit, Schwartz stated that at the beginning of the 1969 primary campaign he instructed his announcers that no candidate was to be allowed on the air without prior approval of the material by Schwartz (WSTC Ex. 1, p. 4).

67. Schwartz testified that he told *all* candidates individually, that their scripts (including paid political announcements in the candidate's own voice) would have to be reviewed prior to broadcast (Tr. 127–28).[18] However, stated Schwartz, he never had occasion to review Wilensky's scripts because Wilensky appeared on WSTC only once and that involved a round table discussion (Tr. 127–28).[19] Gillespie also indicated that Wilensky did not appear in any paid political announcements (Tr. 95–96). Actually, Wilensky personally appeared with John Martin, a WSTC announcer, on 4 to 8 tapes of paid political announcements which were broadcast over WSTC. As a matter of fact, the Wilensky tapes were made at the WSTC studios and Schwartz met Wilensky at the station then (Tr. 369–70, 375, 377).

68. John Martin has been an announcer at WSTC for over six years (Tr. 364–65). At the time of the 1969 mayoral campaign, Martin hosted a program running from 4:00 p.m. to midnight (Tr. 214). The producer of paid political announcements for the Republicans approached Martin and asked him if he would make spots for the Republican Town Committee. Martin agreed and, thereafter, informed Schwartz that he would be working for the Republican Town Committee as an announcer on his own time and off WSTC premises.[20] Schwartz wanted assurance that Martin would not perform his services for the Republicans during his working hours using station equipment (Tr. 366–68).

69. Whenever Martin made a tape for the Republicans which contained the voice of someone else in addition to his own, he used WSTC's studios. On such occasions, WSTC was paid for the use of its facilities. The tapes were not made during Martin's working hours. Wilensky came to the studio between 4 and 8 times to make tapes. On each visit, Schwartz was present at least to greet the candidate or say good-bye (Tr. 369–70, 373–77).

70. When Wilensky made tapes with Martin he would arrive at the studio with his script. Martin did not review Wilensky's scripts. He never suggested that Wilensky make changes in the script in any way (Tr. 370, 378). Schwartz acknowledged that he did not require Martin to submit the tapes he made for Wilensky for review prior to broad-

[18] In a statement given to Commission investigators on September 25, 1970, and in an affidavit sworn to on December 4, 1970 (which was submitted to the Commission), Schwartz admitted that he did not ask to review Wilensky's paid political announcements (WSTC Ex. 1, pp. 4–5, 11–12). In his June 19, 1970 statement, which was the first statement that Schwartz gave to the investigators, Schwartz stated that he requested that all candidates submit their scripts to him for approval. In that statement, Schwartz noted that he had no occasion to suggest any changes in Wilensky's scripts, because of confidence in this candidate to conduct a campaign in good taste and also in Leo Miller, who was assisting Mr. Wilensky in the preparation of his announcements.

[19] Schwartz acknowledged that Wilensky's voice may have appeared in some paid political announcements. Schwartz heard many of the Republican spots but does not remember hearing Wilensky (Tr. 311). In his December 4, 1970 affidavit, Schwartz alleged that Wilensky did not personally appear on WSTC (WSTC Ex. 1, p. 5).

[20] As far as Schwartz was concerned, Martin asked him for permission to do work for Wilensky.

cast. Nor did he ask Martin whether Wilensky was appearing personally on the tapes. Schwartz testified that he was not concerned about Wilensky's tapes because he had confidence that Wilensky would not say something that was in bad taste and, furthermore, Martin was cognizant of WSTC's policies (Tr. 212–14). However, Martin indicated that Schwartz did not instruct him regarding the acceptability of political material. Moreover, Martin never evaluated scripts from the point of view of whether they were acceptable to Schwartz. As far as Martin was concerned, he had no responsibility over the contents of the tapes (Tr. 378–82).[21]

71. On the tapes that Martin made for the Republicans he did not identify himself by name (Tr. 369). He and supporters of Wilensky taped some scripts which promoted the candidacy of Wilensky, and sometimes the tapes were broadcast during Martin's 4:00 p.m. to midnight stint on the air (Tr. 214–15, 372). Martin identified himself to station listeners while on the air during his duty shift (Tr. 372).

72. Initially, Nocerino was given a five-minute spot on Monday evenings immediately preceding the 6:30 p.m. local news. He too was interested in having his weekly five-minute broadcast appear adjacent to WSTC's 6:30 p.m. local news program. He had asked Schwartz for a Monday evening, five-minute spot, adjacent to the local news to run from September 8 through election day (WSTC Ex. 12, Tr. 396–98, 402). After the Democratic primary election in Stamford, Schwartz informed Nocerino that he had forgotten the Republicans had previously purchased a one-minute spot immediately preceding the 6:30 local news (Tr. 173, 400–02). Schwartz offered Nocerino a choice of continuing his weekly Monday evening broadcasts at 6:55, 7:05 or 7:35 p.m. At first, Nocerino objected to the changes in time but after seeing he had no choice agreed, at Schwartz's suggestion as to which was the best alternative, to take the 6:55 p.m. slot which is adjacent to the network's world news (Tr. 173, 402).

73. In late August, 1969, the Republicans purchased time on WSTC for the upcoming campaign. Some of the spots were to run from September 29 through election day. Other spots were to begin on October 13 and continue through election day. One of the spots scheduled from September 29 was a one-minute spot at 6:30 p.m. The Republicans also purchased a 6:40 p.m. spot to begin on October 13. WSTC broadcasts a local news program from 6:30–6:40 in the evening (WSTC Ex. 10; Tr. 174–76; 182). Adjacencies to the major local newscasts such as the 6:30 p.m. news are favored by candidates for their paid political announcements. Schwartz assumed that this is because they believe that WSTC has a large audience for its local news. Although no studies have been done, Schwartz also believes that the audiences are large for the local news (Tr. 174–75, 178).

74. Schwartz had to reschedule Nocerino's spot as he did because it was WSTC's policy not to have the paid political announcements of competing candidates broadcast back-to-back. That is why Schwartz

[21] Schwartz recalled one instance in which the broadcast of a Republican Town Committee paid political announcement in support of Wilensky evoked a protest from Paul Kuczo's sister. Schwartz listened to the tape after receiving the complaint, found it to be in bad taste ("name calling"), and took it off the air. Schwartz does not know how many times the tape had been broadcast. The tape did not contain a candidate's voice (Tr. 216–19).

did not even consider having Nocerino's spot broadcast begin at 6:24 instead of 6:25. Schwartz indicated that the no back-to-back policy was his and that he never discussed it with Gillespie. Schwartz testified that conflicting paid political announcements were separated by a minimum of 10 to 15 minutes (Tr. 178–80). Gillespie testified that he had instituted the policy of not having paid political announcements by competing candidates broadcast back-to-back. However, Gillespie's policy did not include a specific separation period (Tr. 57). WSTC has broadcast back-to-back paid political announcements by candidates who were not seeking the same office (Tr. 179–80).

75. Schwartz indicated that the spot immediately following the 6:30 local news was not available to Nocerino because the Republicans had purchased that spot beginning October 13. Schwartz did not want to have to reschedule Nocerino's broadcasts a second time (Tr. 181–82). However, on November 3 (election day eve), the Republicans had spots broadcast at 6:29 and 6:38 while Kuczo had a paid political announcement running from 6:40 to 6:53. Kuczo's broadcast was followed at 6:55 by Nocerino's regular Monday night five-minute program (Tr. 182). Schwartz explained that because November 3 was the day before election day, WSTC had additional requests for political time and accepted all of them. That is why there was a departure from the station's policy regarding the scheduling of political broadcasts by competing candidates (Tr. 302).

76. For the past seven years WSTC has broadcast the "Italian Melodies" program on Sundays. The program, which is hosted by Vincent Martino, a school teacher, consists of Italian music and news of interest to the Italian community with commercial announcements by Martino interspersed (Tr. 186–87, 604–05). WSTC has a policy proscribing the use of foreign languages on the air. This policy applies to political announcements. Gillespie believes that broadcasts of a foreign language is not in the best interest of those who do not speak the language (Tr. 58, 186). Martino acknowledged that he ignores the no foreign language rule once in a while by congratulating people for birthdays, anniversaries and weddings in Italian. He does this because he feels that some of his audience do not understand English. On these occasions only a few words are spoken in Italian (Tr. 605).

77. During the 1969 campaign, Nocerino spoke to Schwartz about purchasing a five-minute slot within Martino's "Italian Melodies" program, with the purpose of reaching the Italian vote. He told Schwartz that he wanted to have a question and answer format with Martino asking questions in Italian and one of Nocerino's supporters answering in Italian. Schwartz informed Nocerino that he could not use Italian (Tr. 430–31).[22] Since he could not use Italian, Nocerino told Schwartz that he would do the program in English with Martino asking questions and Nocerino supplying the answers (Tr. 432). Nocerino then

[22] Schwartz himself did not recall whether Nocerino had purchased time on "Italian Melodies" and he denied that Nocerino asked him whether he could use Italian. He thinks that Nocerino asked Martino (Tr. 187). Martino, however, recalled that Nocerino had told him that he would be having a five-minute spot done in Italian. Martino thereupon expressed surprise because he had never been permitted to speak Italian on his program. Martino testified that the next day he saw Nocerino who was upset and told him the program could not be done in Italian (Tr. 615). In view of the distinct recollection of the other witnesses about the incident, the Examiner does not credit Schwartz's denial.

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purchased a five-minute spot during Martino's October 19 "Italian Melodies" program (Tr. 187–88).

78. When Nocerino arrived at WSTC studios on October 19, he had with him a typed script calling for questions by Martino and answers by Nocerino. He brought the script to Schwartz to be reviewed. Schwartz then informed Nocerino that Martino does not participate in political programs. Schwartz placed lines through Martino's name wherever it appeared on the script (Bureau Ex. 6; Tr. 190–91, 434). Martino was instructed by Schwartz that he could not appear on the question and answer program (Tr. 616). Nocerino, after being introduced by Martino, went on the air asking and answering his own questions (Tr. 436, 617).

79. Schwartz testified that he did not permit Nocerino to use Martino because of station policy that staff members do not appear in political programs. This policy applies whether or not candidates are also appearing on the broadcast. Under the policy, the WSTC staff does not participate in political broadcasts of any kind, except on forums involving all the candidates (Tr. 191).

80. During the 1969 mayoral campaign, Martino hosted a political program on behalf of supporters of Wilensky's candidacy. On November 2, 1969, Martino had broadcast his regular "Italian Melodies" program and had returned to his home. He received a telephone call from Schwartz who told him to come back to the WSTC studios because he was going to do a special edition of his program. A group of Italian residents in Stamford, calling themselves "Friends of Wilensky" had purchased time from Schwartz that same day for the special program which went on the air at 3:17 in the afternoon (Tr. 193–95, 605–06). The program ran for one hour (Tr. 610).

81. Martino returned to the studio shortly before the program was scheduled to go on the air. Schwartz gave him a script which Martino recalls as being on one sheet of yellow paper. The paper, according to Martino, only contained a list of the people who were sponsoring the program. Martino recalls that Schwartz instructed him to read the names in Italian (Tr. 606–07, 609–12).

82. Schwartz was not in the studio when Martino broadcast the special program. Nor did he listen to the program on the radio. Schwartz did not know whether or not the "Friends of Wilensky" had a script. Schwartz admits that he had no idea what the "Friends of Wilensky" intended to do with the hour of time they purchased. Schwartz assumed, however, that the "Friends of Wilensky" had purchased the time in order to promote their candidate with statements made in his behalf. He did not ask them to submit any such statements for review because it was a last minute arrangement. The only instructions Schwartz gave to Martino were that he duplicate his "Italian Melodies" program.[23] Schwartz did not remember whether he instructed Martino that he could make political announcements during the program "but if it was a paid political broadcast, he probably could

[23] Martino testified that Schwartz instructed him to read the names of the individuals who formed the "Friends of Wilensky" in Italian. Schwartz denied that he knew that any list of names would be read (Tr. 199). In his June 19, 1970, statement to FCC investigators, Schwartz acknowledged that Martino pronounced the names in Italian, but claimed that this was done without his approval (WSTC Ex. 1, p. 10).

have."[24] Schwartz did not know the individuals who called themselves the "Friends of Wilensky" (Tr. 197–201).

83. Martino testified that the special program he did for the "Friends of Wilensky" consisted of the playing of records interspersed with the reading of the yellow paper that he received from Schwartz. The only Italian he remembers using was in the pronunciation of the sponsors. However, when asked whether he used any Italian phrases which praised Wilensky, Martino said that if the phrases were on the paper, he probably read them. Martino denied that he made any statements, in Italian, or English, which were in support of Wilensky or derogatory of the other candidates (Tr. 608–10).

84. A. S. Esposito is a Commissioner of the City of Stamford who supported Wilensky in 1969. He was part of the "Friends of Wilensky" and handled the purchase of the special Martino program for which he personally paid. Esposito brought a script on a white sheet of paper (Martino testified he had a yellow script) to Schwartz (who testified he never saw a script) and told Schwartz that he wanted Martino to do a special edition of his program. Esposito informed Schwartz that he wanted Martino to read the script but said nothing about reading names with an Italian pronunciation. Esposito heard the program. As far as Esposito is concerned, Martino played records and read the script. According to Esposito, Martino did not make any comments which were not on the script (Tr. 635–37, 644–46).

85. Esposito produced a copy of the script he had given to Schwartz. It said "West Side Democrats and Republicans support and will vote for Wilensky and Clapes." This sentence was followed by a list of the names of eight individuals with an Italian region inserted next to each name. Esposito believes that Martino pronounced the first names of the sponsors in Italian. Esposito indicated that Martino also introduced the songs in Italian and supplied, in Italian, an explanation of the meaning of the songs. But he testified that Martino did not say things such as "Wilensky would be a good mayor" either in Italian or English (Tr. 642–43, 645, 654–56).

86. Martino testified that he did not remember any advertising for candidates in 1969 other than the special program for the "Friends of Wilensky" (Tr. 618–19). Esposito testified that he did not know whether the "Friends of Wilensky" purchased any other time during the 1969 campaign and that, if they did, he would not have been the person who was billed. Actually, the "Friends of Wilensky" purchased the time for one program and five announcements on WSTC during the period of November 2–4, 1969. Moreover, Esposito received the bill for these purchases and had the original bill with him at the hearing. The bill also indicates that the "Friends of Wilensky" had a tape made at WSTC. With his memory refreshed, Esposito recalled that Martino made at least one tape for the "Friends of Wilensky" but he did not know the contents of the tape or tapes (Bureau Ex. 11; Tr. 647–52, 657–58).

87. John Nocerino testified he heard Martino promote Wilensky's candidacy in Italian. Nocerino recalls that on the Sunday before election day he heard a segment of a program on which Martino spoke in

[24] The special edition of "Italian Melodies" was logged as political (Tr. 198).

English and Italian. According to Nocerino, Martino used Italian phrases describing Wilensky as a "beautiful man." In Italian and English, Nocerino testified, Martino urged his listeners to vote for Wilensky. Nocerino listened to approximately ten minutes of the program. During approximately half of that time, Martino was speaking about Wilensky. Martino also broadcast music during the program. Nocerino indicated that he understands Italian but cannot speak the language. He could not repeat any of the Italian phrases spoken by Martino (Tr. 431, 436–41).

88. Paul Kuczo's brother, John, has known Vincent Martino since 1960. He testified he has heard Martino introduce songs in Italian on the program "Italian Hour". On the Sunday prior to election day, John Kuczo heard Martino using Italian in political announcements on WSTC. Although Kuczo does not understand Italian, he recognized that Martino was mentioning Julius Wilensky (Tr. 675–78). Paul Kuczo testified further that, during the campaign, he had asked Schwartz whether he could use a foreign language in paid political announcements and was told that station policy prohibited it (Tr. 358). John Kuczo was an aide to his brother during the campaign. He spoke to Martino the day after the special "Italian Hour" broadcast and asked him why Martino had broadcast the political material in Italian. Martino responded that he had to do it or he would have lost his job (Tr. 679).

89. The testimony of Mr. Martino and Mr. Esposito clearly establishes that during the special "Italian Melodies" program on November 2, 1969, Martino announced the names of the "Friends of Wilensky" in Italian and also identified in Italian the region in Italy from which each individual came. Despite Schwartz's denial, Martino's testimony, which the Examiner credits, makes clear that he acted pursuant to instructions from Schwartz in the use of Italian. The sharp conflict between the testimony of Martino and Esposito on the one hand and of John Nocerino and John Kuczo on the other as to whether Martino used laudatory Italian phrases promoting Wilensky's candidacy cannot be resolved. Since Esposito purchased and heard the program and Martino announced the program and neither had any apparent motive for testifying falsely, the Examiner finds no reason to prefer the testimony of Nocerino and Kuczo. It is noteworthy that Nocerino could not repeat any of the Italian phrases he asserted Martino had spoken and that Kuczo does not understand Italian. Conceivably, both heard only the names of persons and places which Martino gave in Italian and the deep impression made by this led to some expansion in their recollections. In any event, the record does not permit a finding that Martino spoke other than the names of persons and places in Italian.

LICENSEE MISREPRESENTATION OR LACK OF CANDOR ISSUE

Julian Schwartz

90. Prior to testifying at the hearing, Julian Schwartz gave two statements to the Commission's investigators. He also executed an affidavit which was submitted as part of WSTC's Petition for Reconsideration. In his June 19, 1970 statement, the first one, Mr. Schwartz

denied that he censored or deleted material from any paid political announcements or broadcast made by candidates during the 1969 mayoral campaign (WSTC Ex. 1, p. 8). He stated:

> I have been informed that allegations have been made that I censored or deleted material from the paid political announcements or programs purchased by candidates in the 1969 Stamford mayoralty election campaign, both during the primary and during the general election campaign. I did not personally censor or delete anything from any such broadcasts. However, in order to ensure that no name-calling or libelous statements were made on the air by the candidates, I requested that they all submit their proposed tapes or continuity to me prior to broadcast for my review and approval. When I noted anything which I considered objectionable in that respect, I suggested to the candidates that they make certain changes in their scripts. . . . I had no occasion to suggest any changes in the broadcasts submitted by JULIUS WILENSKY, the Republican candidate, to the best of my memory. I do recall that from time to time I found it necessary to suggest to Fusion Party candidate JOHN NOCERINO, and to Democratic candidate Paul KUCZO that they make certain changes in their material. With respect to John NOCERINO, I remember that during the early stages of his campaigning I found it necessary to make frequent suggestions to him that he alter his material to conform to station policy as set forth by me, but as time went on, nearing the latter part of the campaign he became better aware of station policy in that regard and I found it decreasingly necessary to suggest changes to him.

Mr. Schwartz stated too that on the special November 2, 1969 "Italian Melodies" program: "All political announcements were read in English and the names of the individual Italian supporters of Wilensky were pronounced in Italian, but without my approval."

91. On September 25, 1970, Schwartz gave his second statement to the investigators.[28] Schwartz stated that he had examined Nocerino's October 13, October 20 and November 3, 1969 scripts and that the marks striking out the material were not his. Schwartz acknowledged that he might have talked to Nocerino about the material and suggested that the material be removed because it was libelous or in bad taste. However, Schwartz denied that he threatened to bar Nocerino from going on the air if the material was not removed (WSTC Ex. 1, p. 12). There is no evidence that when he gave his statements to the investigators, Schwartz was represented by legal counsel.

92. In his September, 1970 statement to Commission investigators, Schwartz had also acknowledged as follows (WSTC Ex. 1, pp. 11–12):

> I am aware that Section 315 of the Communications Act prohibits a station from requiring paid announcements of candidates for political office to be submitted to the station for review before broadcasting but I think I have a responsibility to the station to prevent the broadcasting of anything libelous or rabble raising from being broadcast and that this is an important responsibility; therefore I have required all candidates to submit their material to me unless I have enough confidence in the candidate that he will conduct a campaign in good taste. With regard to the one minute spot announcements of Julius Wilensky a candidate for mayor of Stamford, Conn. in 1969 I had enough confidence in Leo Miller who was assisting Mr. Wilensky in the preparation of his announcements that I did not ask to review their scripts before they were recorded nor did I review their tapes before broadcasting. I also had enough confidence in Mr. Wilensky. He conducted an entirely different campaign in tone than Kuczo and Nocerino.

93. By December 4, 1970, when he signed the affidavit which was submitted to the Commission by WSTC, Schwartz had recalled that,

[28] Schwartz acknowledged that between June and September he had given the matter considerable thought (Tr. 274–76).

while it was his intention to suggest changes, there were arguments between himself and candidates Nocerino and Kuczo over material in their scripts. Schwartz went so far as to acknowledge that he actually could have insisted upon deletions from the scripts and that he could have made the deletions himself. Although Schwartz could not deny that these events occurred, he still had no independent recollection of making or insisting upon deletions (WSTC Ex. 1, pp. 4–5). Schwartz stated also: "I now realize that I did, in fact, unwittingly violate Section 315 of the Act and Commission regulations during this campaign" (WSTC Ex. 1, p. 6). He asserted that if he had not been under strain during the 1969 election campaign period, he certainly would not have gone to this extreme, because it was out of character for him. Schwartz stated also: "I must stress, however, that my only intention was to assist the candidates and to protect the station" (WSTC Ex. 1, p. 5). In the December, 1970 affidavit, Schwartz described himself as being under "tremendous emotional stress" at the time of the 1969 campaign because of events at the station, particularly the negotiation of a labor contract (WSTC Ex. 1, p. 2). Schwartz also indicated that he was under strain during the campaign because he was suffering from hives, gout, and had personal problems at home (Tr. 280). Gillespie also subscribes to the theory that Schwartz may have acted out of character. He has stated: "I am convinced that if Julian Schwartz did, in fact, mishandle Mr. Nocerino and Mr. Kuczo during the 1969 campaign, this happened as a result of his age and health. Certainly it was an isolated incident in an otherwise distinguished career" (December 4, 1970 affidavit; WSTC Ex. 2, pp. 3–4).

94. The health and mental state of Julian Schwartz is also urged as an explanation for the erroneous statements Schwartz gave to the Commission's investigators. Schwartz claims that as a result of the "stress" he was under at the time of the 1969 campaign and because of the passage of time between the campaign and the statements he gave the investigators in June and in September, 1970, his "memory concerning this period is not as clear as it might be." Schwartz also claims that he was upset by the investigation and had no time to think his answers through carefully or to search his memory concerning the 1969 campaign (WSTC Ex. 1, p. 3). As a result of all these factors, Schwartz asserted in his December, 1970 affidavit:

> I did make certain statements to these investigators that, upon reflection, I feel could and should be modified. My purpose here is to set the record straight. (WSTC Ex. 1, p. 2).

Schwartz has made no mention of factors affecting his memory in his June and September 1970 statements.

95. Testimony as to the physical condition of Mr. Schwartz in 1969 has been discussed in Paragraphs 18 and 19, *supra*. It should be added that during 1969, Dr. Sherman, his internist, saw Schwartz more frequently than before when Schwartz had been examined every two or three months. Schwartz, who is 70 years old, has been a patient of Dr. Sherman since 1949. From the health point of view 1969 was a particularly bad year for Schwartz because of a series of illnesses he was experiencing. Dr. Sherman saw Schwartz in his office once in January, once in April, once in July, three times in August, once

in September and once in November. He also saw Schwartz at the patient's home three times during the last quarter of the year (he did not have the exact dates for those visits). Difficulty with hives persisted on and off throughout the fall of 1969. Dr. Sherman attributed episodes of hives and angioneurotic edema to anxiety and tensions. While Dr. Sherman testified Schwartz might have had lapses of memory of a temporary nature, he had no record of Schwartz having complained of suffering from a lapse of memory during the latter part of 1969. He did not diagnose memory lapse as a problem (Tr. 589–599). He said that memory lapses are associated with advancing age (Tr. 601). Dr. Sherman testified that if a person suffers a complete loss of memory, usually he forgets everything that happened as to the period in question. He agreed that stress or preoccupation with a matter can so effect the power of concentration at a particular time so that a person may not be able to recall later what was happening at the time (Tr. 600). Schwartz told Dr. Sherman that labor negotiations were the main source of his tension problem (Tr. 599). The labor negotiations in question began in early October, 1969 and continued through the spring of 1970 (Tr. 626).

Kingsley Gillespie

96. Kingsley Gillespie gave a statement to Commission investigators on September 25, 1970. After asserting that he has full confidence in Mr. Schwartz as a newsman and in dealing with political candidates, Gillespie stated:

> I have not deemed it necessary to give him specific instructions for reviewing paid political broadcasts, however I am aware of his policy of requiring candidates to submit their scripts to him before being broadcast, and I have accepted this judgment.
>
> * * * * * * *
>
> I concur in his policy that all matters broadcast over the station shall not contain libelous material or material that is not in good taste. I expect this policy to be applied to all candidates with uniformity and no discrimination. I would expect that he would watch more carefully a new candidate because of his lack of experience as a candidate and as such he might attempt to broadcast libelous matter or matters in bad taste (WSTC Ex. 2, p. 2).

In an affidavit executed by Mr. Gillespie on December 4, 1970, and submitted to the Commission in support of the licensee's Petition For Reconsideration of the Show Cause Order, he stated, *inter alia:*

> 5. I was aware of his (Schwartz's) policy of requiring candidates to submit their scripts to him before being broadcast, but I was not aware that this violated any regulation of the Federal Communications Commission or any federal statute. I, therefore, accepted his judgment with full confidence that he would not discriminate among candidates.
>
> 6. *I was shocked and distressed to learn that during the 1969 campaign Julian Schwartz was accused of requiring the deletion of material from the speeches of John Nocerino and Paul Kuczo, so much so that I found it difficult to accept.* (Underscoring supplied)
>
> 7. In the 23 years that Julian Schwartz managed the Stations nothing of this sort ever happened. In fact, except for the technical matters discovered in routine inspections, the Stations have never before been accused of violating any rule or statute. To my knowledge no complaint of any substance has been made against them. Principally because of the dedication and ability of Julian Schwartz, WSTC and WSTC FM enjoyed a reputation for fairness and impartiality in news coverage and in the treatment of political candidates.

8. I am convinced that if Julian Schwartz did, in fact, mishandle Mr. Nocerino and Mr. Kuczo during the 1969 campaign, this happened as a result of his age and health. Certainly it was an isolated incident in an otherwise distinguished career (WSTC Ex. 2, pp. 3–4).

97. In the Petition for Reconsideration filed by Western on December 7, 1970, and affirmed by Gillespie, it was stated that he did not know of any complaints by candidates until "long after the fact" (Petition for Reconsideration, p. 16, par. 38, Official Notice taken Tr. 123–24). At the hearing, Mr. Gillespie's attention was directed to this statement and he was asked when Schwartz notified him that Nocerino made a certain statement (the addendum) after his last broadcast. Gillespie answered: "I would be estimating, but I would say two or three days after the broadcast". Gillespie explained that "two or three days" is what he had reference to where the Petition for Reconsideration indicated no complaints came to his attention until long after the fact (Tr. 125). Schwartz's testimony established that he told Gillespie about Nocerino's addendum the morning after the broadcast (Tr. 185).

98. When Gillespie testified three days later he had given the matter a great deal of thought and offered the following explanation: Schwartz came to his office two or three days after Nocerino had broadcast his addendum and told Gillespie of the broadcast.[26] Schwartz did not have a copy of the addendum with him. Schwartz reported the substance of Nocerino's allegations. Gillespie evaluated Nocerino's allegations and threats to complain to the FCC and bring suit from the point of view that candidates say things the day before election day that "you don't really think they mean." Gillespie did not believe there was anything he could do about Nocerino's remarks as the broadcast had already been made. Consequently, he "dismissed it as something that you expect a candidate to do the night before election" (Tr. 688–90). He conceded that, viewed from hindsight, perhaps he did not attach as much importance to the addendum as he should have (Tr. 689).

99. In view of the extraordinary nature of the incident and Schwartz's practice of keeping Gillespie informed almost daily of developments at the station, it is highly improbable that Schwartz failed to report the broadcast of the unreviewed addendum to Gillespie on the very day it came to Schwartz's attention, notwithstanding Gillespie's claim they were both busy on election day. Therefore, Schwartz's version of when the report of Nocerino's broadcast was made to Gillespie is credited in preference to that of Gillespie. Further, for Gillespie to confirm in the statement made in the Petition for Reconsideration that he was not aware of complaints until "long after the fact" was an inexcusable exaggeration.

100. In an affidavit executed by Mr. Gillespie on September 28, 1971, and submitted to the Commission,[27] reference was made to involvement in a revocation hearing concerning the question whether he censored

[26] ". . . To the best of my recollection", Gillespie testified, "it was two or three days later because the following day was election day and we both were very busy on election day and my recollection is that it was during the following week that he told me this story. . . ." (Tr. 689).

[27] This affidavit was submitted by way of supplementation of earlier affidavits submitted by Mr. Gillespie. In point of fact, Mr. Sheldon was not a candidate for mayor in 1969.

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certain political broadcasts during the 1969 Stamford mayoralty political campaign. This affidavit stated, in pertinent part:

> . . . We now find, and have only recently learned, that Mr. Ralph Sheldon, a candidate for office in 1969, contends that (1) Mr. Julian Schwartz censored his scripts and (2) I was aware of it because he complained to me personally. Mr. Schwartz does not so recollect (i.e., his memory of this period is not clear). Although Mr. Sheldon has come to my office on several occasions with criticisms of the newspaper, prior to his visit to my office on September 16, 1971, he never complained that Julian Schwartz censored his material. I have no knowledge of the facts other than what Mr. Sheldon told me recently and as outlined herein. (WSTC Ex. 5, p. 2)

101. The testimony of Mr. Sheldon, which the Examiner has found worthy of belief, unquestionably established that in 1968 he had complained of censorship by Mr. Schwartz. Therefore Gillespie's statement that Sheldon had made no such complaint prior to September 1971 was not true. Indeed, Sheldon had complained on more than one occasion in 1968, and notably during a meeting in Gillespie's office by appointment when Mr. Schwartz also was present (Tr. 510). Possibly Gillespie did not recall the meeting because he had turned a deaf ear to Sheldon's plaint by indicating that Sheldon's radio station problems would have to be handled entirely with Schwartz (Tr. 510–11). On other occasions Sheldon voiced his discontent while standing in the doorway to Gillespie's office, certainly not a very effective way of registering a protest against censorship or making an impression upon Gillespie.

GILLESPIE CONCESSION AND DISCLAIMER

102. Mr. Gillespie, in testifying, conceded that Mr. Schwartz had not acted properly during the 1969 campaign insofar as the handling of political programs and spot announcements are concerned (Tr. 701). While acknowledging that as the chief officer of WSTC he bears a responsibility for what everyone in the organization does, Gillespie claimed that he was blameless insofar as Schwartz acted without his knowledge in going beyond the area of making suggestions to candidates with regard to their political scripts. Gillespie maintained that he did not concur in any proposal or action on Schwartz's part which amounted to preventing a candidate from airing political material if the candidate chose not to agree with a proposed correction or deletion (Tr. 702–03).

POLITICAL ASPECTS

103. Kingsley Gillespie is a registered Republican (Tr. 712). He has never been an active political campaigner or otherwise active in politics (Tr. 699, 713). The Editor and Publisher Yearbook lists the Stamford *Advocate* as an Independent-Republican newspaper [28] but Gillespie considers it to be an Independent in its point of view politically. In 1969, the *Advocate* in an editorial endorsed Wilensky for mayor two working days (a Saturday), prior to the election (Western Ex. 6, p. 13; Tr. 694). The editorial, while stressing desirable qualities found in Wilensky, was not unkindly or harshly critical in appraising his opponents (Western Ex. 6, p. 13). Although the *Advocate* has endorsed Democrats for Senator or Governor, it has never

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endorsed a Democratic candidate for mayor of Stamford within Gillespie's recollection. On occasion the *Advocate* has liked the Democratic candidate for mayor—and has refrained from endorsing any candidate for the office (Tr. 697–98, 711). Gillespie "has been close to several Democratic Mayors" (Tr. 712).

104. The editorial endorsing Wilensky was approved by Gillespie. Although Gillespie did not campaign for Wilensky, he did contribute either to the Republican Town Committee or the State Finance Committee in 1969 (Tr. 699–701, 712–13). WSTC has never endorsed a candidate (Tr. 698). There is no evidence that Schwartz has been active in politics (Tr. 699). Gillespie testified that there was no connection between the manner in which Schwartz handled political scripts in 1969 and the fact that the *Advocate* endorsed Wilensky (Tr. 699). Julian Schwartz played no part in the decision to endorse Wilensky (Tr. 701).

MOTIVES AND REPUTATION OF SCHWARTZ

105. Julian Schwartz testified that, even though he did cross out in their presence parts of candidates' scripts which were objectionable, nothing he did was with the intent of favoring one candidate over the others (Tr. 308). The fact that he urged deletions of Nocerino material critical of Kuczo as well as Wilensky (Pars. 38–41, *supra*, see findings), corroborates this testimony, as does the fact that he took a Wilensky announcement critical of Kuczo off the air (see fn. 21, *supra*). There is no evidence that Schwartz was politically active or had any personal interest in the outcome of the 1969 campaign (Tr. 699). Nor does it appear from the record that Station WSTC expressed a preference for any candidate (Tr. 698).

106. Western introduced a number of affidavits of community leaders, one purpose of which was to establish the good reputation of Julian Schwartz (Tr. 756). All those who commented on his personal qualities of truthfulness, integrity or honesty indicated that his reputation in these respects was of a high order (see Western Ex. 7, pp. 134, 142, 144, 145, 147, 158, 159, 162, 179).

ISSUES (C) AND (d)—LOGGING AND PUBLIC INSPECTION

107. During the period from October 13, 1969 to June 19, 1970, WSTC did not maintain for public inspection a list of the chief executives, officers or members of the executive committees which purchased time for political announcements and programs (Stipulation No. 1; Tr. 263–64). Mr. Schwartz testified that "at some time" in 1969 such a list, which "was not complete", was maintained but there is no factual definition of these phrases in the record. By way of explaining the difficulty of compiling a list because campaigns were loosely and informally organized, he testified: ". . . very often you could ask for lists of officers and nobody knew who it was or nobody knew whether it was an officer and it was only in most cases . . . the candidate himself plus whoever was writing his checks unless it

[28] This designation appeared before Gillespie became associated with the newspaper in 1942. Gillespie either did not think it was significant enough to change or he overlooked doing so (Tr. 697).

was the Republican Town Committee or The Democratic City Committee." (Tr. 262) Schwartz knew keeping a list was required and he thought it was being done (Tr. 260).

108. On the WSTC and WSTC–FM program logs for October 13, 20 and 27, as well as November 3, 1969, there were approximately 150 entries from which it appears that a sponsored announcement had been broadcast for a political candidate. But approximately 142 of those entries did not include any notation to show the type of program. Moreover, approximately 85 entries did not indicate the party affiliation of the candidate. Additionally, approximately 62 entries failed to show the candidate's name. Finally, none of the entries included any notation such as a checkmark to show that announcements concerning sponsorship were made (Stipulation No. 2; Tr. 264). There is, however, evidence which suggests that sponsorship identification was in fact given when political announcements were broadcast by WSTC (Tr. 371). Although afforded the opportunity to do so, Mr. Schwartz gave no explanation for the omissions (Tr. 264). He did state that he did not personally review the logs in their entirety. This was a responsibility placed upon the program director and the bookkeeping department. He gave no specific instructions on log keeping because he assumed the program director knew what to do (Tr. 258–60).

CORRECTIVE ACTION BY LICENSEE

109. All of the candidates testifying at the hearing who were also running in 1971 acknowledged that they were being treated fairly by the station (Tr. 451–52 [Nocerino]; 487 [Giordano]; 520, 522 [Sheldon]). All requests for political advertising time is now approved by the new general manager, Robert J. McCullough (Tr. 707–08). He testified that now the station will not look at the scripts of candidates for any purpose whatsoever, and that if a candidate asked him to look at a script, he would refuse (Tr. 663–64). McCullough also testified that if any complaints were received from a candidate, he would personally investigate them and contact counsel (Tr. 664). Judge Maurice Buckley is a director of Western Connecticut, and he testified that legal problems, including those involving political candidates, would be submitted to him and that he would look to an expert in the field for assistance (Tr. 624–25).

110. McCullough also testified that upon coming to the station he obtained instructions on proper logging procedures from Washington counsel. Each day's log, he said, is checked by him personally and by the programming coordinator. Communications counsel also check the logs frequently (Tr. 662), as does Kingsley Gillespie (Tr. 707).

111. McCullough testified too that the station now keeps a complete list of anyone asking to buy political time on the station and the disposition of that request. The public file also contains a complete record of all officers and directors of committees or organizations buying time on behalf of a candidate, as well as records of all candidates who buy time for themselves. (Tr. 662–63).

112. Kingsley Gillespie testified that since the studios were moved from a third floor walk-up to a new building,[29] his role in the day-to-day operation of the station has substantially increased. He is now at the station for about two hours, four mornings a week (Tr. 707, 709). He stated, "after the citation and the experiences that went with it. I think we're all more alert than we were before" (Tr. 707). Western has retained communications counsel and proposes to do so in the future (Tr. 706).

MERITORIOUS PROGRAMING—ISSUE (g)

113. In response to the meritorious programming issue, Western Connecticut introduced evidence dealing with eight specific areas of the stations' programming performance: ascertainment; absolute and comparative performance during composite weeks; "public affairs" and "other programming"; news programs; community services; community leaders' evaluations of the stations' public service programming contributions; and awards received by the station (Western Ex. 7, and Ex. 14).

A. *Composite Week Data*—

114. Data reflecting programming[30] during the Commission's 1969 and 1970 composite weeks[31] was compiled in accordance with prescribed Commission procedures and regulations regarding program classifications and exclusion of commercial matter in making the computations.[32] Statistically, the breakdown is as follows:

1969 COMPOSITE WEEK

(Total hours of operation: 128 hours, 59 minutes)

	Hours	Minutes	Percent of total time on air
News [33]	39	1	30.25
Local news [34]	15	56	12.35
Network news	23	5	17.90
Public affairs	9	6	7.05
Other	8	55	6.91

[33] In addition, during the 1969 composite week, 2 hours, 30 minutes, or 1.94% of total air time, was devoted to sports news reports.

[34] The figure for "local news" includes all time (exclusive of commercials) devoted to locally-produced newscasts. Such newscasts were prepared in their entirety by the WSTC news staff and featured local and regional news, as well as national and international stories involving Stamford area residents. The figure also includes an average of 2½ minutes per day of locally-compiled world and local news headlines at sign on and approximately ten minutes per day of locally-compiled world, state and local news. "Locally compiled" means news prepared by the WSTC news staff from local and wire service sources (Western Ex. 14, p. 2).

[29] Since July 6, 1971, WSTC has been operating from studios in a new building at 117 Prospect Street (Tr. 50). This building was constructed by Western Connecticut at a cost of over $800,000 (Petition for Reconsideration, p. 18, fn. 5).

[30] Western Ex. 7, pp. 1–42. Since WSTC-FM was substantially duplicating the programming of WSTC during the period covered by the 1969 and 1970 composite weeks—WSTC-FM was separatecast from 11 a.m. to 4 p.m.—composite week data was compiled for WSTC only. WSTC-FM's separatecasting consisted of music, with five-minute news breaks at fifteen minutes before and after the hour (Western Ex. 7, p. 1, fn. 1).

[31] All of the dates in the 1969 and 1970 composite weeks were prior to October 8, 1970, the date of the Order to Show Cause and Notice of Apparent Liability (Western Ex. 7, p. 1, fn. 2).

[32] Western Ex. 7, pp. 1 and 2; and Ex. 14, p. 1. In order to compile that data, all WSTC program logs for the 1969 and 1970 composite weeks were reviewed; where necessary, program classifications were corrected, utilizing prescribed Commission definitions and procedures (Western Ex. 14, pp. 1–2).

1970 COMPOSITE WEEK

(Total hours of operation: 126 hours)

	Hours	Minutes	Percent of total time on air
News [24]	35	10	27.91
Local news	15	12	12.06
Network news	19	58	15.85
Public affairs	5	41	4.51
Other	9	26	7.49

[24] In addition, during the 1970 composite week, 2 hours, 54 minutes, or 2.30% of total air time, was devoted to sports news reports.

115. Of the Public Affairs programming broadcast by WSTC during the 1969 and 1970 composite weeks, 4 hours, 30 minutes were produced in composite week 1969 and 4 hours 30 minutes were locally produced in composite week 1970 (Attachment C to WSTC Ex. 7). WSTC decreased its Public Affairs programming in composite week 1970 by 2 hours 15 minutes (36%), compared to composite week 1969, but maintained the same number of broadcast hours for locally produced Public Affairs programming for each year (WSTC Ex. 7).

116. "Public Affairs" includes talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, roundtables, and similar programs primarily concerning local, national and international public affairs (Rule 73.112, note 1). Programs included in the "Other" category are those falling under the definitions of "Religious" programs, "Instructional" programs, and "Other" programs, as defined in Note 1 (e), (f) and (h) to Section 73.112 of the Rules, respectively. See also Section IV-A, pages i and ii to FCC Form 303.

117. During the 1969 composite week, WSTC broadcast nineteen separate "public affairs" programs, eight of which were locally-produced (Western Ex. 14, pp. 225-228). Those eight locally-produced programs accounted for 4 hours, 42 minutes, or 70% of the time devoted to "public affairs" programming during the composite week.

118. In the 1969 composite week, WSTC also broadcast twenty-four separate programs in the "Other" category, not including the regular "Helco Almanac", "Theater Billboard" and "Bulletin Board" programs (Western Ex. 7, pp. 33-38, pp. 104-107). Of these, eight were locally-produced and accounted for 3 hours, 36 minutes, or 40.4% of the "all other" programming broadcast during the composite week.

119. During the 1970 composite week, WSTC broadcast fifteen separate "public affairs" programs, ten of which were locally-produced (Western Ex. 14, pp. 225-228). Those ten locally-produced programs accounted for 4 hours, 39 minutes, or 82.1% of the time devoted to "public affairs" programming during the 1970 composite week.

120. During the 1970 composite week, WSTC also broadcast twenty-seven separate programs in the "Other" category, not including the regular "Helco Almanac", "Theater Billboard" and "Bulletin Board" programs (Western Ex. 7, pp. 33-38, 104-107; Western Ex. 14, p. 3). Fourteen of those were locally-produced, and accounted for 4 hours, 21 minutes, or 46.1% of the "Other" programming broadcast during the composite week.

121. During the 1969 and 1970 composite weeks, WSTC also broadcast on a daily, or near daily basis, "Theater Billboard", a program giving the times and showings of local theaters; "Hoico Almanac", a program concerning weather and seasonal conditions; and "Bulletin Board", a program giving information regarding local events and organizations (Western Ex. 7, pp. 36–38). During the two composite weeks "Bulletin Board" announcements were made on behalf of over 45 local, civic and charitable organizations (*Id.*).

122. Finally, during the two composite weeks, WSTC broadcast nine individual entertainment programs designed for ethnic groups or young people, and three sporting events, one of which was a local golf tournament and another, a local high-school football game (Western Ex. 7, pp. 38–39).

B. *Comparison With Other Stations*—

123. Western Connecticut also submitted information concerning the programming of 45 other Class IV radio stations (Western Ex. 7, pp. 44–88). Those stations included all of the Class IV stations listed in the 1971 *Broadcasting Yearbook* which were located in New York, Rhode Island, Massachusetts, Vermont, New Hampshire and Maine, and operate on the same frequency as WSTC, 1400 kHz, and on the two immediately adjacent Class IV frequencies, 1340 kHz and 1450 kHz. In addition, all Class IV stations in Connecticut were included in the 45 station study (Tr. 559; Western Ex. 7, p. 7).

124. The average past performance of these 45 stations, as reflected in information for the most recent composite week submitted to the Commission with their 1968 renewal applications, compares with WSTC's performance during the 1969 and 1970 composite weeks as follows:

	Average of 45 other class IV stations [36]	WSTC-1969 composite week [37]	WSTC-1970 composite week [37]
News:			
Hours and minutes	20 hours 50 minutes	39 hours 1 minute	35 hours 10 minutes.
Percent of total time on air	16.2 percent	30.25 percent	27.91 percent.
Public affairs:			
Hours and minutes	5 hours 49 minutes	9 hours 6 minutes	5 hours 41 minutes.
Percent of total time on air	4.7 percent	7.06 percent	4.51 percent.
All other programs:			
Hours and minutes	6 hours 50 minutes	8 hours 55 minutes	9 hours 25 minutes.
Percent of total time on air	5.6 percent	6.91 percent	7.49 percent.

[36] Data compiled from Western Ex. 7, pp. 44–87.
[37] Western Ex. 7, pp. 10–11.

125. In the 1969 composite week of 128 hours, 59 minutes, WSTC devoted a total of 57 hours and 2 minutes, or 44.2% of time on air to programming in the above-mentioned composite week categories (WSTC Ex. 7; p. 10); the comparable figure for the 1970 composite week of 126 hours was 50 hours and 17 minutes, or 39.9% of total time on air (WSTC Ex. 7, p. 11). By contrast, the average amount of time the other 45 Class IV stations devoted to composite week category programming was 33 hours and 29 minutes, or 26.9% of their average broadcast week of 124 hours and 21 minutes (WSTC Ex. 7, pp. 44–88).

126. Analysis of the past programming shown for the other Class IV stations resulted in the following data as a basis for comparison

with WSTC's 1969 and 1970 composite week: As compared with 39 hours and 1 minute (30.25%) in 1969 and 35 hours and 10 minutes of News for WSTC (27.91%) in 1970, 20 stations broadcast from 20 to 30 hours of News and 23 stations broadcast from 10 to 20 hours in this category. As compared with 9 hours and 6 minutes in 1969 (7.06%) and 5 hours and 41 minutes (4.51%) of Public Affairs for WSTC in 1970, 5 stations broadcast 10–15 hours: 1 station, 8–10 hours: 8 stations, 5–8 hours; 10 stations, 3–5 hours; and 18 stations, 1–3 hours. Finally, as compared with 8 hours and 55 minutes in 1969 (6.91%) and "other" programming of 9 hours, 26 minutes (7.49%), by WSTC in 1970, 10 stations broadcast 10–15 hours; 22 stations, 5–10 hours; and 13 stations, 0–5 hours

127. WSTC's ranking in comparison with these other 45 stations is as follows:

	WSTC rank (based on 1969 composite week)	WSTC rank (based on 1970 composite week)
Time devoted to news	1	2
News percent	1	1
Time devoted to public affairs	7	13
Public affairs percent	6	13
Time devoted to other programs	13	12
Other programs percent	15	15

(Computed from data in Western Ex. 7, pp. 3, and 44–87.)

128. Review of the WSTC program logs for the 1969 and 1970 composite weeks (WSTC Ex. 14), discloses a substantial reduction in the number of public service announcements (PSA's), broadcast on WSTC.[38] As compared with 55 minutes and 20 seconds devoted to PSA's in the 1969 composite week, only 32 minutes and 35 seconds of broadcast time were utilized by WSTC–AM for PSA's in the 1970 composite week, which was about a 40% decrease. On Sunday of the 1969 composite week, 12 minutes and 5 seconds of PSA's were aired by WSTC–AM between 6 a.m. and 10 a.m. Thus, about 22% of total PSA time in the 1969 composite week for WSTC–AM was concentrated in the early Sunday morning period. Slightly less than 50% of PSA time on WSTC–AM in the 1969 composite week was concentrated in the weekend. On Wednesday of this composite week there were only 3 minutes of PSA's on the WSTC–AM station; on Friday and Saturday, there were only 4 minutes of PSA's on this station.

129. In the 1970 composite week, Tuesday's logs reflect only 1 minute and 40 seconds of PSA's, and on Thursday and Friday of that week the AM station carried no PSA's. Approximately 20% of the PSA time for the 1970 composite week was concentrated in the Sunday morning period on WSTC–AM between 6:00 a.m. and 10:00 a.m., and all but one minute was broadcast by that station between 6:00 a.m. and 7:00 a.m. on that day. In the WSTC–AM composite week for 1970, about 36% of PSA time was concentrated on the weekend.

130. WSTC–FM, during the composite week for 1969, broadcast

[38] A detailed tabular analysis by date, time of day and amount of time for PSA's in the composite weeks for 1969 and 1970 was presented by the Broadcast Bureau in Paragraph 95 of its proposed findings of fact.

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over 34 minutes more of PSA's than did WSTC-AM.[39] Again, during composite week 1970, the FM station devoted 15 minutes and 15 seconds more time to PSA's (or somewhat less than 50%) than did the AM station. Total time for PSA's in the 1970 composite week on the FM station was about 48 minutes.

131. For the 1969 composite week, WSTC's 160 PSA's exceeded those of 12 other stations among the 45 stations with which compared, but were substantially less than those of the 33 remaining stations in the comparison group (Western Ex. 7, pp. 10, 44–88).[40] When the 1970 composite week for WSTC is compared with the 45 other stations, its 88 PSA's are also substantially less than those of all but 5 of the other Class IV's (Western Ex. 1, p. 11). However, the record reveals no complaint against WSTC for refusal to carry PSA's or with respect to the adequacy or time of scheduling of PSA's.

132. A compilation prepared by the Broadcast Bureau, based on a review of the 1969 and 1970 composite weeks (WSTC Ex. 14), discloses that the time used by WSTC for broadcast of commercial announcements has not been excessive.[41] Nor does the Bureau make any contention to the contrary. In only one period, which occurred between 6:00 a.m. and 10:00 a.m. on Thursday (during morning drive time) in the 1969 composite week did commercial time slightly exceed an average of 18 minutes per hour. For the same period on the following day, the commercial time averages less than 16 minutes per hour. During the FM separatecasting periods shown in the Bureau's tabulation, commercial announcements only once averaged more slightly than three minutes per hour. For the remaining periods shown, FM commercial time during separate casting (11 a.m.–4 p.m.) amounted to 2 minutes per hour or even less.

C. *Ascertainment of Needs*—

133. The management of the stations made a continuing effort to keep abreast of the problems, needs and interests of their service area. This was in part accomplished as a byproduct of the stations' local news coverage (Western Ex. 7, pp. 226–227). In addition, stations' management remained in touch with community leaders as a result of the stations' live coverage of community events of special importance. Finally, many of the stations' programs were the result of joint cooperation between the management and members of the community, and the continuing relationship in connection with these programs also provided an opportunity for the exchange of views and opinions (Western Ex. 7, p. 97).

134. In 1968, WSTC organized the Stamford Radio Council whose purpose was "to advise WSTC on the community needs of its coverage area, Greenwich, Stamford, Darien, and New Canaan." (Western Ex. 7, p. 97–98.) In 1968, the Council consisted of twenty-two area leaders, and a dinner meeting attended by 18 of those leaders was held on July 19, 1968 (Bur. Ex. 13). In 1969, the Council consisted of 25 leaders, and a dinner meeting attended by 19 of those leaders was held on June 25, 1969 (Western Ex. 7, pp. 98, 109). At these meetings, members

[39] The FM station devoted about 60% more time for PSA's than did the AM station.
[40] Six stations reported in excess of 400 PSA's and 2 of these carried an amazing 696 and 617 PSA's, respectively, in the most recent composite week shown in their renewal applications.
[41] See tabulation in Par. 94 of Bureau's proposed findings.

of WSTC management described the stations' operations and explained in detail the purpose of the meeting.[42] Members of the Council were then asked to offer their comments on community problems, needs and interests, and suggest ways the stations could help meet them (Bur. Ex. 13; Western Ex. 7, p. 92). Notes of the meetings and of the comments and suggestions received were made and kept for future use. Most of the comments in the 1968 meeting reported by WSTC were directed toward programming improvements; a few identified community problems (Bur. Ex. 12, pp. 2–3).

135. Members of the station's management were active in many local community activities and organizations. By this active participation the stations were kept informed on the needs and interests of the communities served (Bur. Ex. 13, pp. 3–4). In its most recent renewal application filed before the hearing, Western recited the comments from the Radio Council elicited at the 1968 meeting. Western then stated that it could best serve the needs and interests of the public by "complete local area news coverage of the deliberation of government and civic officials and boards and all public events", by "factual and unbiased State, National and International news", and by 'programs that include the minorities and panel discussions to air vital issues and to provide the public with all sides of every issue." (Bur. Ex. 13, p. 5.)

D. *Local Programing*—

136. Western Connecticut submitted evidence regarding the stations' local programming in four major areas: regular "public affairs" programs; regular non-entertainment programs; live coverage of community events; and entertainment and sports programs of particular interest to the community.[43]

137. In order to provide the Stamford community with firsthand information of governmental activities, WSTC provided regular live coverage of the meetings of local governmental bodies, including:[44]

A. "*Board of Education Meetings.*"—For at least ten years, WSTC has carried live one of the two monthly meetings of the Stamford Board of Education.

B. "*Board of Representatives Meetings.*"—WSTC carried live (and generally to their conclusion) the monthly meetings of the Stamford Board of Representatives. Additionally, the stations broadcast special Board meetings on issues of particular public importance (Western Ex. 7, pp. 99–100).

138. WSTC also broadcast other regular local "public affairs" programs, a number of them produced in cooperation with local governmental or community social or cultural organizations.[45] For the most part, these programs were broadcast between 7 and 8 p.m. on weekday evenings. They included the following programs (Western Ex. 7, pp. 100–104):

A. "*Mayor's Report.*"—This was a bi-monthly program on which the mayor of Stamford and members of his administration reported to Stamford citizens on recent governmental activities.

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[42] At the 1968 meeting, a taped recording reviewing the highlights of the current public service programs was presented (Bur. Ex. 13, p. 2).

[43] The local programming herein described was carried on the stations up to and including October 8, 1970, the date of the Show Cause Order (Tr. 761).

[44] Community leaders whose affidavits were submitted by Western Connecticut, see *infra*, specifically mentioned WSTC's coverage of meetings of governmental bodies (Western Ex. 7, pp. 137; 141; 146; 153–54; 167; and 179).

[45] Several community leaders specifically mentioned the stations' efforts in developing such programs (Western Ex. 7, pp. 111 ["Black Viewpoint"]; 123, 139 ["Washington Report"]; 154 ["Black Viewpoint"]; and 167 ["Know Your Schools"]).

B. "*Urban Redevelopment Commission Reports.*"—WSTC management initiated this program in 1969 in light of the importance to Stamford citizens of the urban renewal projects administered by the Stamford Urban Redevelopment Commission. On the bi-monthly program, the chairman and members of the Commission reported on its activities.

C. "*Let It Be Heard.*"—This was a program produced in cooperation with the Stamford Human Rights Commission on which members of the Commission and guests discussed problems and issues relating to human and civic rights.

D. "*Report from Washington.*"—This was a bi-monthly program on which U.S. Congressmen and Senators from Stamford and surrounding communities reported to their constituents.

E. "*C.T.E. News and Views.*"—This program was initiated in 1968 through mutual agreement and planning between the stations and the Committee on Training and Employment (C.T.E.), Stamford's anti-poverty agency. The bi-monthly program included reports on C.T.E.'s activities and interviews with guests.

F. "*Black Viewpoint.*"—This program grew out of a suggestion made by representatives of the West Main Street Community Center. Produced in cooperation with members of the community center, the bi-monthly program featured representatives from the center, local minority group residents, and guests discussing issues of particular interest to blacks.

G. "*High School Report.*"—This program was presented throughout the school year, and provided an outlet for local student expression. Programs were prepared by students from Stamford's high schools on a rotating basis. Students were responsible for choice of topics, and the program presented discussions and interviews on issues of current interest to the students.

H. "*Community Affairs.*"—On this program, selected issues of particular local or national importance were discussed in depth by panels of local or national experts. The range of topics discussed on "Community Affairs" since January 1, 1968, and until October 8, 1970, included alcoholism and drugs; civic affairs; urban renewal; United Fund; communications media; cultural affairs; education; finances and taxes; foreign affairs; natural resources and conservation; politics; science; social services and housing (Western Ex. 7, pp. 105, 209–19).

I. "*Stamford Forum for World Affairs.*"—WSTC broadcast approximately six to eight of the regular meetings of the Stamford Forum for World Affairs, an organization formed in 1946 to provide area residents with the opportunity to hear prominent national and international speakers discuss topics of current interest in the area of foreign affairs.

J. "*Source Library Program.*"—In cooperation with the Source Library in Darien, Connecticut, WSTC broadcast this series of programs of panel discussions and debates on a broad range of controversial issues.

139. WSTC presented a schedule of locally-produced, non-entertainment non-sports programming. These programs are described below (Western Ex. 7, pp. 104–106):

A. "*Point of View*" (3 times weekly).—This program, hostessed by a local resident, featured live or taped interviews with local and national personalities on a wide variety of topics. Once a year, a series of interviews was done abroad. The interviewees represented a wide cross-section of interests (Western Ex. 7, pp. 221–22).

B. "*Anita Show*" (2 times weekly).—This interview program, which began approximately four years ago, was hostessed by a local woman, who interviewed local people with a particular focus on culture and the arts.

C. "*Making the Most of Maturity*" (weekly).—This program, hostessed by another local woman, featured speakers and discussions on topics of particular interest to the elderly. A series of programs would on occasion be devoted to exploring various aspects of a selected topic (Western Ex. 7, pp. 105–106).[43]

D. "*Worship Services.*"—In cooperation with the Stamford Council of Churches and Synagogues, WSTC broadcast live each Sunday a worship service from an area church. Churches were rotated on a monthly basis.

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[43] Walter I. Hotz, Administrator of Courtland Gardens, specifically praised WSTC's programming efforts on behalf of the elderly (Western Ex. 7, p. 177).

E. "*Reverend, Priest and Rabbi.*"—On this weekly program local clergy from three faiths and their guests discussed topics of current religious interest."[47]

140. WSTC also provided live or tape-delayed coverage of local events of interest to the community.

The following were special local events covered by WSTC on a regular basis (Western Ex. 7, pp. 100–105):[48]

A. "*Zoning Board Hearings.*"—WSTC provided live coverage of the hearings of the zoning board on particularly controversial matters. For example, in 1968, much debate revolved around the issues of scattered sites, and the station carried the board's hearings on the subject.

B. "*Election Returns.*"—All primary and general election returns were broadcast live from the Stamford Registrar's office. Further, the station carried candidates' election night acceptance and concession speeches.

C. "*Service Club Meetings.*"—WSTC broadcast (live or tape) the luncheon meetings of the Kiwanis, Exchange, Rotary, and Lions clubs when they presented speakers of particular interest to the community. The station also broadcast Chamber of Commerce meetings. The meetings of other local groups—such as the Stamford Citizens for Conservation; the Management Council of Southwestern Connecticut; Jobs, Inc.; the Stamford Community Council; and the Tuberculosis and Respiratory Disease Association—were likewise broadcast when they presented speakers of particular importance. Additionally, the stations provided coverage of special meetings or dinners of local service organizations. Of the 99 examples of the stations' 1969 coverage of local community events submitted by Western Connecticut, 29 of the programs broadcast were meetings of local service clubs or organizations; of the 55 examples of 1970 local events, 22 of the programs broadcast were meetings of local service clubs or organizations (Western Ex. 7, pp. 182–207).

D. "*Voice of Democracy Contest.*"—WSTC worked with the Veterans of Foreign Wars in sponsoring and broadcasting the local "Voice of Democracy" contest. Students from area high schools submitted and read an essay on a selected topic. Finalists were invited to WSTC studios, where they read their essays over the air and where the judges picked the Stamford winner.

E. "*Graduation Exercises*".—WSTC carried live the graduation exercises of local high schools, including Stamford, Rippowam, Stamford Catholic, New Canaan, Darien and Greenwich High Schools, and the King's School and Sacred Heart Academy.

F. "*Pink Tent*".—Pink Tent is a summer festival of the arts in Stamford. WSTC has carried live many of the festival's programs each summer since its inception in 1968.

141. In addition to the above-described coverage of regularly-occurring local events, such as ground-breakings, local parades, opening ceremonies, and community Fourth of July, Law Day, Memorial Day and Columbus Day celebrations. Special governmental events were also covered—such as the Mayor's budget report; inauguration ceremonies; the annual report of the head of the Board of Education; and the Board of Representatives' special meeting on Charter Revision. Of the 99 examples of the stations' 1969 coverage of local community events submitted by Western Connecticut, 38 of the programs broadcast were broadcasts of special local events; of the 55 examples of 1970 coverage, 17 were broadcasts of special local events (Western Ex. 7, pp. 182–207).

142. The stations also broadcast local services in honor of particular religious holidays, such as Easter, Christmas, the Jewish High Holy Days. Of the examples of the stations' coverage of local community

[47] Two community leaders mentioned the stations' broadcasts of religious services and of the program "Reverend, Priest and Rabbi" (Western Ex. 7, pp. 131–132).

[48] Several of the community leaders whose affidavits were submitted by Western Connecticut mentioned the stations' coverage of local community events (Western Ex. 7, pp. 130; 132; 141; 143; 149 and 165).

events. 12 of the programs broadcast in 1969 were special religious services, and six of the programs broadcast in 1970 were special religious services (Western Ex. 7, pp. 182–207).

143. The stations also broadcast the concerts of local performing arts societies such as the Men's Ensemble, the Young Philharmonic Society, the Stamford Glee Club, and the Schubert Club. Concerts from the three local high schools were also broadcast. Of the 99 examples of the stations' 1969 coverage of local community events submitted by Western Connecticut, nineteen were broadcasts of local concerts; of the 55 examples of 1970 coverage, eight were broadcasts of local concerts.

144. The stations also broadcast the following locally-oriented entertainment and sports programs (Western Ex. 7, pp. 106–107):

A. *"Alice Edwards Johnson"*.—This was a program of gospel music and information of particular interest to the area black community. It was hostessed by a local black resident, and was broadcast Saturday evenings from 8:05 to 9:00 p.m.

B. *"Here, There and Everywhere"* [49].—In 1969, WSTC worked with Dr. Peter Goldmark of CBS in developing the program, which was run entirely by local high school students. It featured music oriented to the younger set, as well as occasional discussions on problems and issues of particular interest to young people. The program was broadcast daily from 3:00 to 4:00 p.m.[50]

C. *"Italian, Polish and Irish Hours"*.—These programs presented music and news of particular interest to ethnic groups within WSTC's service area. Each was hosted by a local man. In addition to music, the programs presented announcements of community activities of particular interest to local ethnic groups. They were carried on weekend afternoons.

D. *"Local Sports"*.—WSTC carried the championship games of the Babe Ruth and Little Leagues. WSTC also carried Pop Warner football and provided live coverage of the football games of the three local high schools.

E. *News.*

145. In its news programming, WSTC combined locally-produced and network news to produce its news reports throughout the day. Approximately 43% of the news broadcast is locally produced, the remaining 57% coming from ABC network and other sources. In addition to its daily news presentations, the WSTC news staff compiles news on special subjects or events of interest to the community (WSTC Ex. 7, pp. 226–227).

F. *Community Services.*

146. The stations provided local residents with notifications of all school closings due to weather; notifications of industry working schedule changes; notifications of changes in schedules of divisions of municipal government; reports on road conditions based on reports from local authorities and state police; notifications regarding commuter train delays; information regarding the contents of school lunch menus; and notifications regarding all power and telephone service failures,[51] weather reports, and beach and boating reports. The station also helped to promote the activities of local organizations,[52] and local community events.

[49] Discontinued after release of the Show Cause Order.

[50] Three of the community leaders whose affidavits were submitted by Western Connecticut specifically mentioned the stations' efforts in developing this program (Western Ex. 7, pp. 111, 171 and 174).

[51] Several community leaders whose affidavits were submitted by Western Connecticut specifically noted WSTC's community service in this regard (Western Ex. 7, pp. 116, 122, 123, 140 and 167).

[52] Several community leaders whose affidavits were submitted by Western Connecticut specifically praised the stations' efforts in promoting the cause of local charitable and civic organizations (Western Ex. 7, pp. 123, 124, 126, 147, 166 and 169).

G. Community Evaluation.

147. Western submitted the verified affidavits of forty-four Stamford area community leaders (Western Ex. 7, pp. 111–180),[53] which were admitted with reference to particular programs or aspects of community service as evidence of the meritorius nature of the stations' programming (Tr. 754; 756–759). These statements were directed to various facets of WSTC's program services. They are dated in the six week period immediately prior to the commencement of the hearing; therefore it is a fair inference that the statements were solicited by the licensee for presentation at the hearing although there is no evidence that the specific comments did not originate from the authors. Specific areas praised by these community leaders included the stations' live or tape-delayed coverage of meetings of local governmental bodies;[54] programs developed by the stations in cooperation with local governmental, cultural or charitable organizations;[55] the stations' programming efforts on behalf of minority groups;[56] the stations' coverage of local community events;[57] the stations' sports programming;[58] and the stations' news coverage, particularly of local events.[59] Three community leaders specifically mentioned WSTC's role in developing the program "Here, There and Everywhere."[60] Several community leaders particularly noted the stations' contribution in providing the community services discussed *supra*.[61] Finally, a number of community leaders praised the stations' efforts in utilizing its program services in promoting the causes of enumerated local community and charitable organizations.[62]

H. Awards.

148. Western submitted thirteen unsolicited award certificates received by the stations from various civic and charitable organizations for their public service contributions (Western Ex. 7, pp. 232–244). These awards were presented by: The Department of the Treasury for support of the savings bonds program; National Federation of Music Clubs in connection with the 1971 Parade of American Music; Committee on Training and Employment, Inc. of Stamford (1970); Radio Free Europe for 1970 campaign; Girl Scout Council, Inc. (1970); U.S. Department of Interior for services in improving the environment; American Association of Retired Persons for the Year 1969; Stamford Jaycees (1969); Save the Children Federation (1971); 1968 Christmas Seal Campaign; Campaign against Respiratory Diseases; Stamford Health Department—an award to the "Here, There, and Everywhere" program in connection with Cleaner Air Week; and Stamford Jaycees (1967).

149. Additional certificates of award received by the station for its public service efforts included the following: for United States Air Force recruiting program (1968); Kiwanis International "In Ap-

[53] An unverified letter from the broadcast media director of the New York Mets baseball team was also submitted (Western Ex. 7, p. 115).
[54] Western Ex. 7, pp. 141, 146, 153–54, 167 and 169.
[55] Western Ex. 7, pp. 111, 123, 139, 154 and 167.
[56] Western Ex. 7, pp. 111, 120 and 154.
[57] Western Ex. 7, pp. 130, 133, 141, 143, 149 and 165.
[58] Western Ex. 7, pp. 115 and 143.
[59] Western Ex. 7, pp. 111, 124, 128, 153 and 160.
[60] Western Ex. 7, pp. 111, 171 and 174.
[61] Western Ex. 7, pp. 116, 122–23, and 167–68.
[62] Western Ex. 7, 123, 125–26, 128, 149, 166 and 169.

preciation for Outstanding Service"; American Cancer Society "In Acknowledgment of Outstanding Service"; United Cerebral Palsy Telethon (1966); and State of Connecticut Constitutional Convention to Station WSTC-FM (1965).

CONCLUSIONS

Stations WSTC-AM and FM and Stamford Advocate

1. Stamford, Connecticut, which has a population of about 109,000 is situated in the southeastern part of the state, about 35 miles from New York City. Western Connecticut Broadcasting Company (Western), is the licensee of Stamford's only local broadcast stations—WSTC and WSTC-FM. These stations also serve the Connecticut towns of Greenwich, Darien, and New Canaan, whose combined population is about 98,000. Mr. Kingsley Gillespie, the President, Treasurer and a Director of Western, owns 51.6% of its stock. The Gillespie family owns Stamford's only local daily newspaper—the *Stamford Advocate*. Mr. Gillespie, the President, Treasurer and a Director of the newspaper organization, is also the publisher of the *Advocate*, which has been controlled by the Gillespie family since 1867. The newspaper is Stamford's oldest business enterprise. The radio stations were acquired by Western in 1946 and 1947 (first the AM station, by purchase, and then the FM station by original application). Prior to this proceeding the stations have regularly received license renewals and, except for technical violations discovered in routine inspections, they have never been charged with violation of any Commission statute or rule.

THE CENSORSHIP ISSUE

2. Section 315(a) of the Communications Act of 1934, as amended, provides, in pertinent part:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section.* . . . (Italic supplied)

Section 73.120(b) of the Commission's Rules, applicable to AM stations and Section 73.290(b), applicable to FM stations, incorporate the foregoing provisions of Section 315(a).

3. The Commission's Public Notice of April 27, 1966 entitled "Use of Broadcast Facilities by Candidates For Public Office"[6] (31 F.R. 6660), contained interpretations applying the prohibitions of Section 315(a) and the parallel regulations to various situations. Among other things, the 1966 Primer (Part VII), indicated that it would not be permissible for a station to delete material in a political broadcast because it believes such matter is or may be libelous. The Commission stated in this connection (Q. and A. 1): "Any such action would entail censorship which is expressly prohibited by section 315 of the

[6] Hereinafter referred to as the "1966 Primer".

Communications Act." Moreover, the Commission in the 1966 Primer (Part VII, Q. and A. 7) noted that "any requirement of an advance script from a candidate violates 315." [64]

4. In the Fall of 1969, Stamford elected a Mayor. Preceding the general election, the Democrats selected their candidate in a primary election contest that saw Paul Kuczo, Jr. defeat the incumbent Mayor, Bruno Giordano. The Republicans did not have a primary contest but nominated a candidate. Mr. Kuczo then faced his Republican opponent, Julius Wilensky, and an Independent candidate, John Nocerino, who called his party the Fusion Party. All of these candidates used the WSTC stations in their campaigns by purchasing time for paid political announcements. Julian Schwartz, who was the general manager of WSTC from 1947 to November, 1970, personally handled the sale of time for political broadcasts during the 1969 primary and general mayoral elections. During 1969 Schwartz was also secretary and a director of Western.

5. The findings of fact reflect that during the 1969 Stamford mayoral campaign, both in the primary and general election phases, Station WSTC repeatedly violated the censorship prohibition of Section 315(a) and of the corresponding provisions in Sections 73.120(b) and 73.290(b) of Commission regulations. The censorship took two forms. First, Schwartz required all three candidates in the primary election to submit their scripts to him in advance of broadcast for his review of their content. Also, in the general election Schwartz required Democratic candidate Kuczo and Fusion candidate Nocerino to present their scripts to him for review of their material before they appeared on the air. Both candidates were instructed to arrive at the WSTC studio in advance of their broadcast or taping sessions. If Schwartz was there, he reviewed the candidate's script. If Schwartz was away from the studio, the candidate read the script to him over the telephone.[65]

6. The Republican candidate for Mayor, Julius Wilensky, appeared personally at WSTC's studio at least four times to participate in recording tapes to be broadcast as political announcements. At the studio Mr. Wilensky enjoyed the professional assistance of John Martin, a WSTC announcer, who had been employed by the Republican Town Committee to do their spots outside of his working hours with the station. On those occasions when Mr. Wilensky made tapes at WSTC's studio he was invariably either greeted or bade good-bye by WSTC's manager, Julian Schwartz. Schwartz, however, despite such unequivocal testimony by an employee of the station, consistently denied that Wilensky appeared personally in paid political announcements. Neither Mr. Schwartz nor Mr. Martin reviewed Mr. Wilensky's scripts before they were taped or broadcast. Whatever was on the script was taped, and whatever was taped was broadcast.

7. According to Schwartz, the purpose of his reviewing political scripts was to make certain that the text could be delivered within the time purchased and to insure that the material was "in good taste".

[64] The Commission indicated the following exception to the prohibition against requiring an advance script: "The licensee may request submission of an advance script, to aid in its presentation of the program (e.g., suggestions as to the amount of time needed to deliver the script."

[65] Kuczo's opponent in the Democratic primary was only reviewed when he taped his announcements at the WSTC studio. When he taped his scripts elsewhere, his material was not reviewed.

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He testified too that his motive was to protect the reputation of the station and to assist the candidates. Schwartz considered material not in good taste if it involved name-calling or a person's reputation, an exaggeration or seemed otherwise objectionable. Kingsley Gillespie was aware of Schwartz's policy of requiring candidates to submit scripts for review in advance of broadcast. Although Gillespie was not happy over the policy, he subscribed to it because, as he expressed it, he could think of no better solution to the problem of preserving the image of the station for good taste. One of the purposes of reviewing the scripts, Gillespie testified, "was to keep from destroying the image of the station that we had spent so many years building up." Regardless of the concern of Gillespie and Schwartz over "good taste" and in preserving the WSTC image, under the terms of the Commission's 1966 Primer, any requirement for candidates' advance submission of scripts for substantive review is forbidden by Section 315(a). In this respect, therefore, it is clear that Western, with the knowledge of its president and principal stockholder, pursued a policy which constituted censorship under Commission guidelines.

3. Both Gillespie and Schwartz testified they were unaware that such a policy violated the Act, and the Examiner credits this testimony. Prior to issuance of its 1966 Primer, the Commission itself subscribed to the view that a requirement of advance submission of scripts was consistent with Section 315(a); see *H. A. I. Rosenberg*, 11 RR 236, 237 (1958); *D. L. Grace*, 40 F.C.C. 297, 298 (1958). Thus the understanding of Gillespie and Schwartz agreed with the above-cited Commission letters of interpretation regarding Section 315(a) although there is no evidence as to whether either interpretative letter was read by Gillespie or Schwartz. The Commission's 1966 Primer (Question 7), expressed a change in interpretation since it stated that except for the purpose of timing, "any requirement of an advance script violates Section 315." Schwartz testified that he had read the Question 7 material (quoted in Paragraph 16 of findings above) "prior to" the 1969 campaign (Tr. 244). But the record is not clear as to just how long before that campaign he had seen this material. Schwartz's testimony does establish that sometime in 1968 he had read a portion of a document published by the National Association of Broadcasters in the same year which led him to believe his policy was not in violation of Section 315 (Para. 15 of findings, *supra*). The document entitled "Political Broadcast Catechism and Fairness Doctrine" implied in Question and Answer 67 that scripts could be reviewed and expressly stated that a licensee should attempt to persuade a candidate to delete obscene or defamatory passages from his material.[46] Schwartz construed the Question 67 portion of the Catechism as stating a licensee could request candidates to submit their scripts for review (Tr. 279). It was reasonable, in light of the National Association of Broadcasters' interpretation of Section 315(a) considered above, for Schwartz as a layman to believe that his policy of requiring advance scripts was proper. The licensee did not have communications counsel to advise it that the earlier Commission interpretation published in the 1966 Primer had not been changed, despite any implication in the 1968 NAB publication to the contrary.

[46] Question 67 and answer thereto is set forth in Paragraph 15 of the findings, *supra*.

9. From whence Gillespie derived his belief that the policy of requiring advance scripts for review was legal under the Communications Act does not appear from the record. He testified that he told Schwartz in the late 40's that the latter had a right to review political scripts and suggest changes (see footnote, p. 20, *supra*). He also indicated that he kept himself informed "in a general way" on Commission regulations but placed "complete reliance" on Schwartz, the general manager, in this area (Tr. 686–687). However, as the president and majority stockholder of the licensee, Gillespie cannot insulate himself from responsibility for compliance with Section 315(a) by relying upon the general manager either for interpretation or implementation thereof. Obviously there is no requirement that a licensee of a broadcast station seek guidance from knowledgeable communications counsel in running its station. But the provisions of Section 315(a), among other parts of the Communications Act, require a degree of sophistication in their application that may not be possessed by even an experienced broadcaster. Thus, the wisdom of Western's construing and applying Section 315(a) without advice of communications counsel or inquiry to the Commission is questionable. This is well illustrated in the present case by the fact that Gillespie was apparently unaware of the 1966 Primer interpretation of Section 315(a) which was contrary to his long held belief as to the right to require advance scripts. At the same time, one can sympathize with the unhappy plight of a broadcaster who, in reliance on an association release, arrived at an erroneous interpretation of the Act and Commission regulations. But, under the given circumstances, where an abrupt change from the Commission's previous explicit interpretation was ascertained from an implication in the 1968 NAB release, prudence dictated that some further inquiry be made by the licensee to make sure what the law was. The licensee's failure to do so resulted in serious, albeit not deliberate, violations of Section 315(a) of the Act in an especially significant area of public concern.

10. The basic purpose of the absolute prohibition against censorship in Section 315(a) is to assure candidates of the opportunity to use broadcast facilities unfettered by licensee judgments as to the manner of use. *Farmers Union* v. *WDAY*, 360 U.S. 527, 529. Thus, as the Supreme Court has pointed out, Congress intended to use the term "censorship" in Section 315 in its "commonly understood meaning" which "connotes *any* examination of thought or expression in order to prevent publication of 'objectionable' material" (*Ibid.* at p. 527). The findings of fact reflect a second way in which the licensee repeatedly violated the censorship provision of Section 315(a) during the 1969 election campaign was by reviewing some of Mayor Giordano's scripts in the primary campaign (par. 31 of Findings), by reviewing Fusion candidate John Nocerino's scripts (three or four), in September 1969 (par. 33 of Findings), by reviewing Democratic candidate Kuczo's scripts on six occasions during the general election campaign (par. 25 of Findings), and by reviewing at least five of Nocerino's scripts during the general election campaign (pars. 34–39 of Findings).

11. The review of political scripts at WSTC was performed by the general manager, Mr. Schwartz. The president of the licensee, Mr.

Gillespie, knew that Schwartz was reviewing candidates' scripts during the 1969 primary and general election campaigns in Stamford. Gillespie was not present at nor did he participate in, the actual reviewing. The activities of Schwartz in scrutinizing scripts produced changes in their content made at his suggestion and, beyond that, deletions made by him personally ranging from phrases to sentences usually and even an entire paragraph on occasion. It was Gillespie's belief that under Section 315(a), candidates could be persuaded to make changes in their scripts but could not be compelled to do so. Schwartz was of the same view, so he professed.

12. Schwartz suggested changes in Mayor Giordano's scripts during the 1969 primary, finding portions of them to be "too strong". While the candidate disagreed at times, he always yielded and accepted Schwartz's suggestions, apprehending there would be "repercussions" if he failed to go along. Schwartz, as noted above, also reviewed the Kuczo and Nocerino scripts. Using pen or pencil, Schwartz applied his own standard of "good taste". Schwartz personally crossed out or insisted the candidates cross out those segments of their scripts which he found to be objectionable. At times arguments ensued during which the candidates sought to preserve the integrity of their scripts. On one occasion, a candidate angrily declared that Schwartz has "a hell of a nerve" because there was nothing wrong with the crossed-out material. Schwartz, however, was not interested in debates. The material comes out—or you do not go on, he told Kuczo and Nocerino on separate occasions. In forcing the deletion of material against the candidates' wishes and in intimidating candidates from protesting changes by having previously threatened to keep them off the air when they had voiced objections, Schwartz exceeded the limits of his avowed understanding that candidates could at most be induced to make changes in their scripts by persuasion, and in no event by compulsion.

13. The findings detailed above demonstrate that, in his role as a self-appointed censor, Schwartz was arbitrary. Schwartz took exception to the type of material that one might encounter in any campaign: that an opposing candidate's statements must be taken with a grain of salt; that the opposition had a poor labor record; that an opposing candidate spent $70,000 to change his image (Schwartz thought this sum was an exaggeration); that an opposing candidate would support big business; that an opposing candidate had lost his "cool"; and that an opponent had accomplished little during his long public life. Schwarz deleted an entire paragraph from a script because he believed the contents were untrue. Other deletions he made because the crossed-out material was "in bad taste", was "unnecessary", was "in poor taste", or constituted "personal attacks". The reasons stated by Schwartz for his deletions were highly subjective. Moreover, they afforded no justification for the blatant acts of censorship which were the end result of Schwartz's rationalizations.

14. Gillespie knew that insisting upon deletions and changes in scripts over candidates' objections was violative of Section 315(a). So far as appears from the record, he did not see any of the candidates' scripts either before or after Schwartz reviewed them. Nor did he know the deletions or changes made in scripts by Schwartz, whether without candidates' objections or despite them. However, Gillespie was in-

formed by Schwartz in the course of their almost daily meetings that the latter had some problems with some of the candidates and was taking care of them. Schwartz did not elaborate. Gillespie was also told by Schwartz, according to the latter's testimony, that Mr. Nocerino, the Fusion candidate, had objected to some of the changes made by Schwartz, with no further comment by the latter. Schwartz subsequently testified that, when asked by Gillespie how things were going with Nocerino, Schwartz had replied that he had made some changes in Nocerino's broadcasts. At this point Schwartz did not recall whether Gillespie had asked how Nocerino reacted to the changes although Schwartz stated that "he probably did". It is not evident from Schwartz's testimony or other evidence that Gillespie was told that the changes were made or retained after attempts to overcome the objections had proven ineffective or that Schwartz did not even attempt to persuade Nocerino to drop the objections.[67]

15. The findings reflect that at times Nocerino arrived at the WSTC studio after Schwartz had left and therefore Nocerino read the current script to Schwartz over the telephone. Based on Gillespie's testimony, it has been found that Schwartz complained to Gillespie that he could not "delete" any part of a script over the phone. Gillespie further testified that Schwartz informed him too that deletions or changes made were always persuasive (Tr. 87). While Gillespie's testimony indicates he was thus apprized that Schwartz was making deletions and other changes in scripts, it further reflects that he was also informed by Schwartz these changes were always effected with the agreement of the candidates.

16. It is obvious Gillespie's confidence in Schwartz was misplaced when he relied upon the latter's assurances that review of candidates' scripts was being kept within the bounds of persuasion. But as the chief executive officer of the licensee—one who played an active role in the operation of the WSTC stations—it was Gillespie's responsibility to prevent the coercive and dictatorial behavior of Schwartz in reviewing candidates' scripts during the 1969 mayoral campaign. There was an abdication of this responsibility on Gillespie's part in not taking measures to insure that the candidates would be afforded the opportunity of unhampered expression of their views and ideas. He made no effort to as certain the manner in which Schwartz was in fact reviewing the scripts. He at no time made it a point to be present at the station when Schwartz was in the process of discussing a script with a candidate. Although Gillespie was informed by Schwartz of "difficulties" with candidate Nocerino and of objections to some of the "changes" made, he did not invite Nocerino to discuss what had occurred and how this candidate could be satisfied in the future. Even after Nocerino complained on the air of illegal censorship by WSTC, Gillespie made no effort to contact Nocerino. Nor did Gillespie seek to learn at firsthand from other candidates whether they had complaints after Schwartz told him there were some problems with some of the candidates. He was content with Schwartz's cryptic assurance that the latter was taking care of these problems. Indeed, he did not seek to elicit from Schwartz the details of such problems or how Schwartz

[67] Pertinent testimony of Schwartz is quoted or discussed in Pars. 50–52 of the Findings.

was dealing with them. Gillespie's failure to pursue the several courses of action indicated above justifies the conclusion that he was not "tending the store" when it came to overseeing WSTC's treatment of all but one of the candidates in the 1969 Stamford mayoral election.

17. Nocerino telephoned the Stamford newspaper twice to complain to Gillespie first of deletions and then of a threat by Schwartz to keep him off the air if certain material was not deleted. Nocerino received no return call, although requested by him, after being told Gillespie was not in. Gillespie denied in his testimony that he was informed of the calls. There is no evidence to the contrary, and no showing that Nocerino spoke to Gilliespie's secretary who kept a record of phone calls in his absence, or even that the calls were made during regular office hours. While it may seem curious Gillespie was not informed of either call, the evidence does not merit the conclusion that he had ignored Nocerino's efforts to reach him.

18. Just as Gillespie failed to react responsibly to reports by Schwartz of dissatisfaction with review of scripts among the candidates during the 1969 election, so too he was complacent in the face of complaints of censorship by a candidate for public office in 1968 Stamford elections. Ralph Sheldon ran in the primaries, first for Judge of Probate and later for State Senate. Schwartz reviewed his scripts and required changes in them over Sheldon's objections. Schwartz went so far as to tell Sheldon that the material in his scripts had been presented to Gillespie and the stations' attorney for their approval—this was not true. Sheldon sought a meeting with Gillespie at which Schwartz also was present. Sheldon complained then of interference with the expression of his ideology and stated that he wanted more freedom of speech. Gillespie was not informed there had been deletions, nor was he shown the specific changes or any of Sheldon's scripts. His only response was to inform Sheldon that complaints had to be handled by Schwartz because the station was a separate organization from the newspaper. Once or twice Sheldon stopped at the door to Gillespie's office and complained that his political announcements and news releases were being censored. He met with the same response as before—tell it to Schwartz. While Gillespie did not take Sheldon's complaints seriously because of Sheldon's blithe antics such as engaging in gymnastic stunts and reciting poetry and his critical remarks in the role of a civic gadfly, as well as the "hit and run" nature of his visits, including making quick comments about censorship while standing in the office doorway, there was nevertheless substance in Sheldon's protests. In any event, despite the manifestations of Sheldon's entertaining and reformist personality noted in Gillespie's testimony, he was put on notice that Schwartz could be engaging in conduct in the handling of a candidate's material which required Gillespie's intervention and his close supervision of Schwartz in the political area. In sloughing off Sheldon's complaints of censorship in 1968, Gillespie's hands-off attitude was no deterrent to Schwartz's following the policy of censoring candidates' scripts as he personally saw fit in the 1969 mayoral election campaign.

EQUAL OPPORTUNITIES ISSUE

19. Section 315 of the Communications Act, the Commission's Rules (Sections 73.120(b) and 73.290(b)) as well as the "Primer" require licensees to afford all candidates with equal opportunities in the use of the broadcast facilities. Section 73.120(c)(2) provides:

> In making time available to candidates for public office no licensee shall make any discrimination between candidates *in* charges, *practices*, regulations, facilities, or *services* for or in connection with the service rendered pursuant to this part, *or make or give any preference to any candidate for public office or subject any such candidate to any prejudice or disadvantage;* nor shall any licensee make any contact or other agreement which shall have the effect of permitting any legally qualified candidate for any public office to broadcast to the exclusion of other legally qualified candidates for the same public office. (Italic supplied)

20. WSTC's treatment of Messrs. Wilensky, Kuczo and Nocerino (all of whom appeared personally in paid political announcements) was notably unequal. Perhaps the striking example of this lies in the fact that Wilensky was favored as the only candidate who was not subjected to illegal censorship. This is not to suggest that errant licensees should make a determined effort to censor *all* rather than some of the candidates.[68] But the fact remains that Wilensky was free to say whatever he wanted to say (which is the way it should be), whereas his two opponents were repeatedly subjected to stringent censorship. It is not a valid excuse for this discriminatory treatment that Schwartz had confidence that Wilensky would not indulge in announcements in poor taste.

21. Early in the 1969 campaign the Republicans purchased spots on WSTC for their paid political anouncements. The purchase included adjacencies to the popular local news program broadcast at 6:30 to 6:40 in the evening. In Stamford, adjacencies to the major local newscasts are favored by political candidates. In and of itself it was perfectly permissible for WSTC to accept the Republicans' reservation. The adjacency before this news program was reserved for commencement on September 29 to run until election day and the other adjacency was reserved for commencement on October 13 to run also until election day. Nocerino, the Fusion candidate, had asked Schwartz for, and had received, a five-minute spot on Monday evenings immediately preceding the 6:30 local news. After the primary election, Schwartz told Nocerino he had forgotten about the adjacency reservations by the Republicans and offered an adjacency prior to the 6:55 network world news or a spot at 7:05 or 7:35 p.m. Schwartz did not consider offering Nocerino a 6:24 spot because of Schwartz's policy of not broadcasting political announcements of competing candidates back-to-back. Under the station's practice such announcements were separated by a 10 to 15 minute minimum period. Nocerino, thus foreclosed from the adjacency to the 6:30 news, after objecting to the change in time, agreed to take, at Schwartz's suggestion as to the best alternative, the 6:55 p.m. slot.

22. The Commission has construed the Section 315 provision for affording candidates "equal opportunities" as including "the desir-

[68] Obviously, no censorship of any political candidate's speeches should ever be undertaken.

ability of the time segment allotted as well as its length." Primer, Question 1, 3 F.C.C. 2d 463, 491 (1966): "And while there is no requirement that a station afford candidate B exactly the same time of the day or exactly the same day of the week as candidate A, the time segments offered must be comparable as to desirability." (IBID.) The time arrangement which Nocerino had no choice but to accept resulted in preferential treatment for the Republican candidate for mayor. The general manager of WSTC knew that the 6:30-6:40 p.m. adjacencies were regarded by candidates as optimum slots. Yet he failed to accommodate Nocerino's request for the adjacency before 6:30 p.m. even for one evening a week. Nor did he offer Nocerino a closer time to the local evening news than 6:55 p.m. In view of the "equal opportunities" requirement of affording comparable time, he should have at least waived the WSTC minimum separation policy.

23. The minimum separation policy was in fact waived when Democratic candidate Kuezo placed an order for an additional spot before election day. It would have been appropriate to have waived sooner so that Nocerino could have had his program broadcast during a time period which was comparable to that being utilized by his Republican opponent. Because of the failure of WSTC to afford comparable time for Nocerino's broadcasts, it must again be concluded that the equal opportunities issue is to be resolved adversely to the licensee. In this connection, it should be noted that the licensee made no effort to ascertain from the Commission or counsel what its legal obligations were in the situation presented by Nocerino's request for the adjacency contracted to the Republicans. Moreover, careful consideration of the problem just on the basis of fair treatment to all candidates should have told WSTC management that the Republican candidate was being given a decided advantage over Nocerino—coincidently one that Section 310 does not tolerate. The violation was repeated with every broadcast by Nocerino, and it was willful in that it did not take place through inadvertence but through deliberate choice on Schwartz's part. Gillespie had no part in the violation—apparently Schwartz took it upon himself to decide the matter without even bringing it to Gillespie's attention.

24. Several spot announcements in which Wilensky personally appeared were made with the professional help of John Martin, a WSTC announcer. Mr. Martin's assistance was rendered outside the scope of his regular employment and was not identified by name in the announcements he taped with Wilensky. WSTC was paid for the use of its facilities when Martin and Wilensky taped the political spots at WSTC studios. Candidate Nocerino sought to purchase a five-minute spot to be broadcast within the "Italian Melodies" hour on Sunday, conducted by Vincent Martino, a school teacher. He proposed a question and answer format in Italian in which Martino would participate. Schwartz informed Nocerino Italian could not be used. Nocerino then proposed to do his program in English, with Martino and himself participating. After agreeing to this arrangement, Schwartz later repudiated it on the ground that Martino does not participate in political programs. The result was that Nocerino went on the air, was introduced by Martino, and asked and answered his own questions. Denial of Martino's participation in the English presentation in the

manner proposed by Nocerino was not discriminatory when compared with Martin's participation in Wilensky's spots. There was a clear distinction in the nature of the two types of presentation. The one involving Martin was a short spot whereas Nocerino's proposal would have required Martino to appear in a lengthier program format. Moreover, Martin was not identified on the Wilensky spots and they were not broadcast live whereas Nocerino proposed a live interlude in the "Italian Melodies" hour program and Martino, as the person who conducted it on Sundays, was identifiable merely by reason of his repeated participation therein.

25. The record reveals that at Schwartz's direction Martino broadcast a special edition of the "Italian Melodies" hour on the Sunday before election day, sponsored by a group calling themselves "Friends of Wilensky". Upon Schwartz's instructions, Martino announced the names of the sponsors in Italian and gave the names of the regions in Italy they came from in Italian. While only announcements conveying this information was involved, the use of Italian even to the limited extent mentioned above constituted discrimination against Nocerino who was refused the use of Italian either by Martino or himself on the question and answer program he had placed in the "Italian Melodies" hour. The special edition program involved discrimination against Nocerino in yet another way. It was logged as "political" and Martino's participation therein by announcing on his own program the sponsors and their places of origin in Italian amounted to his appearing on a political program which he was not permitted to do when Nocerino requested his services in connection with the same program. It must be concluded that the special broadcast of the "Italian Melodies" program in the manner described above involved wilfull failure to afford equal opportunities to all candidates for the office of mayor, in violation of Section 315(a) and the comparable regulations of the Commission.

MISREPRESENTATION OR LACK OF CANDOR

26. Schwartz was interviewed by Commission investigators in June, 1970. He gave them a statement (Western Ex. 1, pp. 8–10). He denied censoring Nocerino and Kuczo or deleting material from their announcements. Schwartz was again interviewed by Commission investigators in September, 1970, and furnished a statement (Western Ex. 1, pp. 11–12). He again denied censoring the two candidates although he had Nocerino's censored scripts before him. At that time he specifically denied that the deletions were made by him. But they were. Schwartz denied too that he threatened to bar Nocerino from going on the air if he did not remove objectionable material. The facts show otherwise. Schwartz did acknowledge in his statements that he required the mayoral candidates (except Wilensky), to submit their scripts for review and that he suggested changes be made to alter their material to conform to station policy. In his June, 1970 statement, Schwartz asserted that the names of Wilensky's supporters had been pronounced in Italian on the special Martino program without Schwartz's permission. This was untrue inasmuch as it has been found that Martino so pronounced the names at Schwartz's direction.

27. Finally, in a December, 1970 affidavit (Western Ex. 1, pp. 2-7), which was filed by WSTC as part of its Petition for Reconsideration, Schwartz acknowledged that he might have insisted upon deletions in Kuczo's and Nocerino's scripts and that he might have made deletions a condition to the use of WSTC's facilities. He stated that he did not remember either making or insisting upon deletions. He also indicated he was under tremendous emotional stress during the 1969 campaign because of labor problems at the station. At the hearing, however, Schwartz maintained that he did not require Kuczo or Nocerino to make any deletions—that all deletions in the scripts were made with the concurrence of the candidate. The findings show that deletions were forced upon the two candidates, contrary to Schwartz's claim.

28. In a December 4, 1970 affidavit submitted to the Commission Gillespie asserted he had been "shocked and distressed" to learn that during the 1969 campaign Schwartz was accused of requiring the deletion of material from the spots of Nocerino and Kuczo, "so much so that (he) found it difficult to accept." Gillespie noted that the stations never before had been accused of violation except for routine matters and that nothing of this sort had happened before during Schwartz's tenure (Western Ex. 2, pp. 3-4). Distressed Gillespie undoubtedly was, but was he really "shocked"? The word refers to a state of mind, a subjective reaction known only by Gillespie and ascertainable by others only from observation of his appearance and behavior, as well as from his comments at a particular time. Except for his own statement, there is no direct evidence as to how Gillespie reacted to learning that Schwartz had been charged with compelling deletions of material from political spots. It is true as Gillespie has pointed out, that no such allegation had been made against Schwartz or WSTC, either by the Commission or by candidates prior to 1969. While Gillespie knew that Schwartz was requiring the submission of scripts for review he did not witness or participate in the deletion of material nor was he shown deletions which had been made. Again, although Schwartz reported his inability to make deletions in Nocerino's material over the telephone, Gillespie was given to understand that all changes made at the station were made with the agreement of the candidates. Too, there is no cogent evidence that when Sheldon complained to Gillespie of censorship in 1968, he mentioned that "deletions" had been made by Schwartz over his objection. That Schwartz had engaged in the extreme practice of striking out material and forcing acceptance of the deletions which extended to entire paragraphs could well have been "shocking" to Gillespie. From the record there is no adequate basis for concluding to the contrary and hence it is not found that Gillespie misrepresented or was lacking in candor when he claimed to have been "shocked" upon learning of the accusation of Schwartz's requiring the deletion of material.

29. It is not amiss to point out, however, that if Gillespie had not delegated authority in Schwartz to review scripts, with no supervision or further inquiry when advised by Schwartz of candidates' objections and difficulties with them, there would have been no occasion to be shocked. At the hearing, Gillespie acknowledged that the review of scripts posed "the threat of censorship when you try to talk a man out

of poor taste". Yet he failed to institute procedures to preclude the incidence of censorship.

30. In an affidavit of September 28, 1971, submitted to the Commission by Gillespie, he stated that Sheldon had never complained to him of censorship by Schwartz prior to a visit to the newspaper office on September 16, 1971. As has been found, this statement by Gillespie was untrue. For, in a meeting held by appointment in Gillespie's office in 1968 and on some other occasions when passing by the office, Sheldon had complained of censorship by Schwartz. Denial of this by Gillespie was a misrepresentation. Since Gillespie was not inclined to pay serious attention to Sheldon's comments and shunted him off to Schwartz, this and attendant circumstances suggest that Gillespie in 1971 did not recall the incidents with Sheldon in 1968 and did not knowingly and wilfully misrepresent when he denied them.[69] That Gillespie or Schwartz made no record of the complaints is indicative of the cavalier manner in which they were treated by both men.

31. It has been found that Gillespie's affirmation, under oath, of the statement made in the Petition for Reconsideration that he was not aware of complaints until "long after the fact" was an inexcusable exaggeration. Even according to his own testimony at the hearing (Tr. 689), it was at most only two or three days later that Gillespie learned of a complaint of censorship made during a broadcast by Nocerino. Certainly he was not being truthful in making the statement in question, and while he may have had no ready recollection,[70] he was guilty of irresponsibility in not searching his memory carefully or checking with Schwartz before approving of this erroneous assertion.

32. As shown by the findings (Pars. 18 and 93), Schwartz, then 68 years of age, was in poor health and under unusual stress in the fall of 1969. His doctor testified that Schwartz had never before been affected by anxieties to the extent that they caused physical manifestations such as hives and hypertension. In the opinion of his doctor, Schwartz's physical and emotional condition could have affected his judgment and in fact caused him to be irritable and upset. Judge Maurice Buckley, who handled labor negotiations for the station beginning in October, 1969, testified that Schwartz, who was assisting him, appeared high strung and became easily aggravated. Even the testimony of the candidates indicates that a change came over Schwartz as the campaign progressed in that the scope of his objections to material broadened.

33. Though recognizing the existence of Schwartz's physical and emotional problems, his doctor's testimony concerning them, and the intensification of his censorship activities, do not warrant the conclusion that Schwartz was acting out of character in 1969 because he was under stress. First, the record does not suggest that the performance of his managerial duties in other areas than the political one was aberrational. Further, he was reporting to Gillespie on a daily basis, and at the hearing Gillespie made no claim that he found any reason to question whether Schwartz was behaving in a way to cause prob-

[69] Except for the meeting of about five minutes in duration, Sheldon voiced his complaints from the doorway of Gillespie's office when Gillespie, as publisher of the newspaper, was at his desk.

[70] At the hearing, he placed the time of Gillespie's report about Nocerino's complaint by estimating it with reference to election day. Schwartz testified he told Gillespie the day following the event.

lems at the station. Indeed, there is no indication from the record that Gillespie detected anything to cause him to visit the WSTC stations to check on what Schwartz was doing. Further, Schwartz was routinely reviewing all political scripts (except those of Wilensky), all during the 1969 primary and general elections, and this process began even before Schwartz was involved in labor negotiations which was a major source of anxiety. It was to be expected that the reviewing would be intensified when the election entered the more crucial stage after the primary campaign. Moreover, his thorough review of material in the general election was not consistent with any physical state that would adversely affect his behavior. That the changes made by Schwartz strikes one as quixotic is only a reflection of the fact that he was applying his own strict standards of good taste. The attempt to explain away Schwartz's actions in violation of Section 315(a) and pertinent regulations on the ground of personal problems must be rejected as unsupportable in light of the considerations noted above.

34. As noted above, in two statements and an affidavit furnished by Schwartz to the Commission between June and December of 1970, he made assertions about matters occurring in 1969 which, in light of evidence adduced at the hearing, have been found untrue. It has been found too that in his testimony in October of 1971, Schwartz also made statements about the same and other matters which were not credited by the Examiner. Six witnesses gave testimony contradicting Schwartz on various points and in every instance the Examiner has chosen to credit their testimony.[71] At the same time the Examiner has found Schwartz's testimony credible in several significant areas, such as, for example, that Schwartz informed Gillespie about Nocerino's on-the-air complaint the following morning whereas Gillespie testified he learned of it two or three days later; that Schwartz had read the 1968 National Association of Broadcasters publication which he interpreted as supporting his policy of reviewing scripts; and that he discontinued a paid political announcement in support of Wilensky which he found objectionable on the ground of name-calling.

35. Western contends that Schwartz did not deliberately make the misrepresentations in his prehearing statements to the Commission and that he did not prevaricate in giving untrue statements in the course of his testimony. To support this argument, Western asserts that "Schwartz is an elderly man who was affected by a severe combination of physical and emotional pressures during the period in question" which affected, among other things, his memory. Western adds that if Schwartz's recollection of events in the fall of 1969 was unclear, "it is attributable to these factors and the passage of time, not to any nefarious intent."

36. The Broadcast Bureau, on the other hand, contends that this is not a case of lack of memory by Schwartz but an intentional misstatement of the facts. Schwartz, the Bureau states, cast facts in a manner which would be most favorably construed for the licensee.[72] The Bureau further comments that Schwartz's own physician did not diagnose memory loss as a problem.

[71] In one instance, involving Nocerino's tardiness in arriving at the studio, the Examiner has preferred Gillespie's testimony on the ground of stronger recollection.

[72] As examples of calculated untruths the Bureau points out: that Schwartz "remembered" he reviewed Wilensky's scripts which in fact he did not do; and that after examining Nocerino's scripts Schwartz unequivocally stated the deletions were not his doing, but they were.

37. A choice between the opposing viewpoints outlined above on the question of whether Schwartz deliberately and knowingly falsified in his prehearing statements and his testimony must now be made. The resolution is not one easy to come by, for cogent arguments can be marshalled for the positions of both parties. Favoring the Bureau's contention is the compelling consideration that Schwartz's statements on a considerable number of important evidential issues were repeatedly proven untrue by the testimony of several other witnesses. Indeed the testimony of candidates for public office was delivered in such convincing fashion as to leave no room for doubt they were telling the truth and Schwartz's conflicting testimony could not be credited. The continual undermining of Schwartz's credibility through opposing testimony deemed reliable by the Examiner also brings to the fore the consideration that Schwartz had a very strong motive for falsifying—to preserve his unblemished record of a quarter of a century's service with WSTC.

38. Notwithstanding the adverse considerations discussed above, the Examiner has reached the conclusion that Schwartz did not engage in deliberate misrepresentation in his prehearing statements or in prevaricating in giving his testimony. The reasons which have influenced the Examiner to arrive at this determination are as follows. First, his demeanor at the hearing provided no clue that he was lying. Secondly, time and again his response to questions indicated that he had a poor recollection, or indeed, no recollection about many events albeit he did remember some. He did not recall the particulars of sessions with candidates. In this connection, his doctor testified that Schwartz in the latter part of 1969 was suffering from ailments attributable to anxiety and tension, and that stress affects the ability to concentrate so that events do not register on one's mind. It is noteworthy that except in his affidavit of December 4, 1970, when he acknowledged that he could have insisted upon deletions from scripts, he consistently denied requiring deletions. Contradictions in the testimony or statements of a witness are a good indication of lack of veracity in a witness, and, with the exception of certain statements of concession which were made by Schwartz in his affidavit even though he had no independent recollection that he made or insisted upon deletions, he evinced consistency in his denials thereof and in his testimony on other matters. The overwhelming impression created by Schwartz's testimony is that the misstatements made by him were the product of faulty recollection rather than intentional untruthfulness. This conclusion finds support in the sworn statements of community leaders indicating Schwartz's reputation for truthfulness, integrity and honesty is of a high order.

Maintenance of program logs—Issue (c)

39. Sections 73.112 and 73.282 of the Commission's Rules specify the manner in which AM and FM radio stations are to maintain program logs. Sections 73.112(a)(1)(iii) and 73.282(a)(1)(iii) provide that each program entered on the log is to be classified as to type. However, of the approximately 150 entries which appeared to record sponsored announcements for political candidates, approximately 142 did not include a notation to show the type of program as required by the Rules. Approximately 85 entries did not show the political affiliation of the candidate as required by Sections 73.112(a)(4)(ii) and 73.282

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(a)(4)(ii). In addition, approximately 62 entries failed to list the candidate's name as required by the same sections. None of the entries included any notation, such as a check mark, to show that announcements concerning sponsorship were made, as required by Sections 73.112(a)(2)(iii) and 73.282(a)(2)(iii) of the Rules. The evidence suggests that sponsorship announcements were in fact made.

40. Obviously, the logging regulations cited above were each repeatedly violated and in wholesale fashion. Periodic review of the station's programming logs with an eye to checking compliance with the regulations in question would have disclosed the delinquencies. Mr. Schwartz, the general manager, placed the responsibility for such review upon the program director and the bookkeeping department and gave no specific instructions on log keeping. That others failed him is not an acceptable excuse for his own neglect to exercise minimum supervisory oversight. Corrective measures have been instituted to prevent a repetition of the violations of Commission's rules relating to program logs.

Maintenance of political file—Issue (d)

41. Sections 73.119(f) and 73.289(f) of the Commission's Rules require licensees to maintain for public inspection a list of the chief executives, officers or members of the executive committees which purchased time for political announcements and programs. It was stipulated that WSTC did not maintain such a list during the period from October 13, 1969 to June 19, 1970. Because of the duration of this type of violation over a long period, it is concluded that it was repeatedly committed. But since Schwartz thought a list was being kept its absence did not result from wilful disregard. Had Schwartz not been negligent in checking, however, the violations could not have happened. Their recurrence is now being prevented by the institution of the required measures.

MOTIVES OF SCHWARTZ

42. In its Order denying reconsideration (30 F.C.C. 2d 303, 304–305), the Commission indicated that inquiry would be appropriate into Schwartz's motives in his treatment of Kuczo and Nocerino. Principally, it desired clarification of incidents which led the Bureau to conclude that Schwartz's actions might have been part of a comprehensive scheme to favor one candidate over another. The Bureau, however, absolutely failed to establish the existence of any such scheme.

43. On the contrary, the reasonable conclusion to be drawn from the evidence is that Schwartz's motives in censoring were those he stated to the candidates and to the Commission. He simply wanted to ensure that all material broadcast over the stations conformed to his standards of good taste. The lack of intention to favor a particular candidate is evidenced by the fact that Schwartz objected to references in the Nocerino scripts which were uncomplimentary to both of the other candidates. He also took a Wilensky announcement attacking Kuczo off the air immediately after he learned of it. These actions are inconsistent with a view of Schwartz as a man with a fixed purpose to favor the Republican candidate. They are perfectly consistent, however, with a view of him as a man who was imbued with the desire to preserve good taste on his stations.

44. By refusing to accede to Nocerino's request to utilize an adjacency to the 6:30 p.m. local news for a five-minute spot while giving Wilensky the benefit of the adjacencies on both sides of the local news programs, Schwartz was failing to fulfill the obligation under Section 315 (a) to afford Nocerino an equal opportunity. But Schwartz's reason for doing so was to honor a prior contractual commitment to the Republicans. In failing to allocate time to Nocerino even before or after the Republican adjacencies, Schwartz was adhering to his policy of not allowing political announcements by candidates for the same public office back-to-back. Thus his unequal treatment of Nocerino with respect to the adjacency request is attributable to reasons other than calculated preferential treatment.

45. It is true that Schwartz did direct Mr. Martino, the host on the "Italian Melodies" special program to pronounce the names and places of origin of Wilensky's supporters in Italian when announcing a list of the persons sponsoring that program. Schwartz had refused Nocerino's request to have a program of questions and answers broadcast in Italian [73] during the "Italian Hour" or to have Nocerino participate even in an English version of his proposed program.[74] It has been concluded that the participation of Martino in the special program resulted in preferential treatment contrary to Section 315 of the Act. Yet it can be noted that Martino's participation in the special program was limited to the role of announcer and that no extensive use of Italian in comparison with the proposed Nocerino program was made in this connection. Moreover, Nocerino was permitted to buy time on the "Italian Hour" and Martino was announcer for his presentation. Thus the isolated example of willful violation during the special Italian hour is not so flagrant as to support the conclusion that Schwartz was motivated by favoritism toward a particular candidate in the 1969 election.

46. To bolster this conclusion, it can be added that Schwartz has never been active in politics, and the stations have never endorsed any political candidate. The newspaper did endorse Wilensky but no connection has been established between this endorsement and the way candidates were handled at the stations. In fact, the evidence points to the conclusion that except for Gillespie's oversight of both media the newspaper and the stations were operated independently of each other.

Meritorious programing issue

47. An issue added by the Review Board after release of the Commission's show cause order calls for a determination whether the programming of Stations WSTC-AM and FM have been "meritorious, particularly with regard to public service programs." [75] The Broadcast Bureau contends that aside from the substantial amount of time WSTC devotes to news, a "superior record" of service to the community has not been established. Western asserts that "meritorious" is by nature "both an absolute and a comparative concept." It then argues that, from the standpoint of evaluation on an absolute basis, WSTC has offered a "superior" program service to Stamford, particularly in the area of news and local expression. And, when rated on a comparative basis, adds Western, WSTC's performance places it "well in advance

[73] WSTC policy forbade a foreign language program.
[74] It was against station policy for a staff member to participate in a political broadcast.
[75] Review Board Memorandum Opinion and Order (FCC 70R-455), released December 30, 1970.

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of other stations." Neither party has cited any Commission precedent which equates the term "meritorious" with "superior" performance. Moreover, viewed in the abstract, both "meritorious" and "superior" are nebulous words. However, the Examiner believes it is reasonable to regard both terms as denoting performance better than ordinary or above average to such an extent that it is praiseworthy.

48. Consideration of WSTC's programming in the non-entertainment categories for the composite weeks of 1969 and 1970 leads to the conclusion that on an overall basis it was meritorious. In both years its local news programs (locally produced newscasts) were presented during more than 12% of the total broadcast day. The total percentage of time devoted to both local and network news was over 30% in the 1969 composite week and about 28% in the 1970 composite week. These percentages in the news category demonstrate that WSTC's performance was outstanding in an area of broadcast service which is so vital for an informed citizenry. Indeed, WSTC ranked above forty-five other New England (including all of Connecticut) Class IV stations in a comparison of percentages of time utilized for news programming.

49. In 1969 composite week WSTC devoted about nine hours, or over 7% of total time, to public affairs programming and in the 1970 composite week it devoted about 5⅔ hours, or about 4.5% of total time, to this very important category. The stations' locally-produced public affairs programming which was 4½ hours in 1969 remained at the same level in composite week 1970. A comparison with the 45 other Class IV stations in this category reflects a superior devotion to public affairs inasmuch as WSTC ranked seventh in amount of time and sixth in percentage of time in 1969 and thirteenth in both amount of time and percentage of time in 1970. But the laudable nature of WSTC's performance is even better shown by a recital of the specific programming of special significance in the local public affairs sector: monthly meetings, and special meetings on issues of particular importance, of the Stamford Board of Representatives were carried live; Board of Education meetings were broadcast live monthly; "Mayor's Report"—a bimonthly program in which the Mayor and members of his administration report on their recent activities was carried; "Black Viewpoint", presenting discussion of issues of particular interest to blacks, was carried bimonthly; "Community Affairs", involving a panel discussion in depth of selected important issues, local and national was presented; and "Source Library Program", a series of programs of panel discussions and debates on a broad range of controversial issues, was carried in cooperation with the Source Library in Darien. It is noteworthy too that during the 1969 composite week, WSTC broadcast eight locally-produced programs and a total of nineteen programs in the public affairs category. And in the 1970 composite week, WSTC carried ten such locally produced programs, with fifteen in all being broadcast. Certainly the large volume of public affairs programming in itself bespeaks WSTC's highly commendable attention to "public service programming."

50. In time devoted to "other" programming (religious, instructional, etc.), WSTC ranked among the highest third both in 1969 and 1970, based upon a comparison with the 45 other Class IV stations.

This was clearly above average performance on its part. The "other" programming encompassed a wide variety of programs of undoubted interest and benefit to WSTC listeners. In the 1969 composite week the stations carried 99 local community events and in the 1970 composite week, some 55 such events. Service club and Chamber of Commerce meetings of other local service groups were broadcast. All primary and general election returns were broadcast live, as were candidates' acceptance and concession speeches. Additional programs in the "other" programming category have been described in the findings (see pars. 139–143 of Findings). Together with the programs mentioned above, they point to the conclusion that WSTC's programming in the category under consideration evinced a zealous attention to the needs of the community and constituted meritorious performance by the stations.

51. The Examiner has attached no particular significance to the award certificates received by WSTC from various civic and charitable organizations laudatory or appreciative of public service programming. They were not received as the result of comparative evaluation of the particular programs mentioned and represent the usual acknowledgements of public service announcements and other programming which are routinely sent to cooperative stations. However, the forty-four affidavits of Stamford area community leaders apparently submitted to WSTC after solicitation have been given some weight. They praise the stations' initiative, cooperation, and other efforts in public service programming. The evident sincerity of the writers of these letters bolsters the Examiner's conclusions as to the meritorious performance of WSTC in the public affairs and "other" programming categories.

52. There is one aspect of WSTC's public service programming which requires critical discussion, namely, its record with regard to public service announcements (PSA's). For the 1969 composite week WSTC–AM carried 55 minutes and 20 seconds of PSA's. The number of PSA's carried during this total period was 160; this was substantially less than the number of PSA's carried by 33 of the 45 other Class IV stations with which WSTC was compared. In the 1969 composite week, WSTC carried only 32 minutes and 35 seconds of PSA's, and the total such announcements were 88, again substantially less than the number carried by all but five of the other Class IV stations in the comparison group. Western offered no explanation of the sharp decline in PSA's reflected by comparison of the 1969 and 1970 data. Certainly, based on the comparisons with other Class IV stations, WSTC's performance cannot be termed "meritorious". The WSTC–FM station in both composite years devoted about 60% more time and somewhat under 50% more time in the respective years to PSA's than its sister station. But this too was not outstanding service. However, there is no record of any complaint against WSTC for refusal to carry PSA's or for inadequacy of its PSA service.

53. A review of WSTC–AM's program logs for the 1969 and 1970 composite weeks has revealed that WSTC concentrated about 50% of the time devoted to PSA's in the weekend of the 1969 composite week and about 36% of its PSA time in the weekend of the 1970 composite week. Even more striking, about 22% of PSA time in the 1969 composite week was concentrated in the early Sunday morning period

between 6:00 a.m. and 10:00 a.m. Again, in the 1970 composite week, approximately 22% of PSA time was concentrated in the early Sunday morning period, with all but one minute having been broadcast between 6:00 a.m. and 7:00 a.m. of that day. The concentration practices of WSTC with regard to PSA's noted above were patently objectionable. The licensee made no attempt to justify them. Indeed, what valid reason could be advanced for scheduling about 20% of its weekly PSA time between 6:00 a.m. and 7:00 a.m. on a Sunday morning? Clearly, the volume, and scheduling of PSA's by WSTC as discussed above require the conclusion that in its presentation of PSA's the licensee was not providing a meritorious service. It may well be that the PSA scheduling practices engaged in by WSTC are not uncommon. If so, licensees engaging in similar practices might do well to bear in mind that meritorious PSA service is not demonstrated merely by pointing to the number of PSA's broadcast or to the total amount of time devoted to them. For undue concentration of PSA's can render their presentation ineffectual and thus indicative of inferior public service.

54. Despite the shortcomings in WSTC's PSA performance detailed above, its showing with respect to the other significant programming areas (news, public affairs and "other") has been sufficiently impressive to warrant the conclusion that overall the licensee has provided a meritorious service. Its broad programming in the field of public affairs reflects an unusual degree of dedication to the goal of a well informed electorate. WSTC's "other" programming in the non-entertainment field has been marked by close attention to the needs and interests of various community organizations: broadcast of meetings of local service clubs; broadcast of regularly occurring local events such as holiday and Law Day observances; local services for particular religious holidays (12 in 1969 and 6 in 1970); and graduation ceremonies of all high schools within the WSTC service area. It has provided a noteworthy service in the field of cultural entertainment by carrying live many of the programs presented in connection with the summer festival of arts in Stamford and a goodly number of concerts of the local performing arts societies (19 in 1969 and 8 in 1970). Other WSTC entertainment programs are equally notable: music and news of particular interest to different ethnic groups; and music and information of special interest to the local black community. Statements of community leaders submitted in the record commended WSTC for the stations' efforts in developing the following programs: "Black Viewpoint", "Washington Report" and "Know Your Schools". Other programs discussed in the findings further show WSTC's praiseworthy service to the Stamford community and area (pars. 138–140 of Findings).

SUMMATION

55. It has been concluded that Station WSTC (AM and FM) repeatedly violated the political censorship prohibition of Section 315 (a) of the Communications Act and corresponding provisions in Sections 73.120(b) and 73.290(b) of Commission regulations during the 1969 primary and general mayoral elections in Stamford. The manner of violation was two-fold. First, the general manager of the sta-

tions required all candidates in the primary election and all candidates except the Republican candidate in the general election to submit their scripts of political announcements for review of their contents prior to broadcast. This practice is forbidden by the Act and pertinent regulations. The president and controlling stockholder of the licensee of WSTC knew that the illegal policy was being applied by the general manager. Both men were of the belief that the review requirement was not improper; the general manager relied upon a 1968 publication of the National Association of Broadcasters which he so construed, and the president in turn relied upon the general manager. WSTC did not seek the advice of counsel in the communications field or direct inquiry to the Commission, to ascertain the legality of review of scripts.

56. The second form of repeated censorship violation was committed by the actual review of candidates' scripts of political announcements and programs during both the primary and general elections. The reviewing was performed by the general manager and the president of the stations knew this was being done although he was not present at, nor did he participate in, the reviewing process. It was the president's belief that it was proper under Section 315(a) to review scripts and to attempt to have changes made by persuasion only and never by compulsion. The general manager professed the same belief. But in fact the general manager on several occasions forced the deletion of material by threats to keep candidates off the air when they voiced objections. Moreover, the deletions and changes required by the general manager, although made for the avowed sake of "good-taste," were arbitrary since they reflected his own personal views of good taste. While it does not appear the president of WSTC was informed of the specific changes or told that they were made in the face of candidates' strong objections and even accompanied by threats of refusing use of the WSTC stations, he nevertheless abdicated his responsibility as chief executive officer in failing to take measures to prevent blatant censorship or even to make further inquiry when informed there had been "objections" by a candidate and that there were "difficulties" with this candidate. The president had previously sloughed off generalized complaints by a political candidate of censorship in 1968 against the general manager which were not taken seriously for reasons discussed above in Par. 18 of the Conclusions. Thus, he neglected to exercise the necessary close supervision of the station manager indicated by the 1968 complaints.

57. The conclusion has also been reached that WSTC, through the actions of its general manager, violated the equal opportunities requirement of Section 315 of the Act and Sections 73.120(b) and 73.290 (b) of the Rules during the 1969 general election by subjecting the Democratic and Fusion candidates for mayor to illegal censorship while giving the Republican candidate a free reign in delivering his political announcements. There was repeated violation of Section 315 of the regulations in this respect since the censorship was practiced upon several announcements of the other candidates. Moreover, the violation was wilful insofar as the general manager knew he was exceeding even his own understanding of permissible review by requiring deletions over objections of the protesting Democratic and Fusion candidates. The general manager of WSTC further illegally discrimi-

nated against the Fusion candidate during the 1969 election campaign by failing to make time available to him adjacent to, or near, the 6:30–6:40 p.m. popular local news program one evening a week while affording the Republican candidate the preferred adjacencies on both sides of the local news. This type of violation was repeatedly and wilfully committed during the campaign, as has been concluded above (see par. 23 of Conclusions). Finally, the general manager of WSTC wilfully violated the equal opportunities requirement by directing the host of a special "Italian Melodies" program to appear in a political program and pronounce the names and places of origin of the sponsors of a program promoting the candidacy of the Republican candidate while denying the request of the Fusion candidate to have the same host participate in a question and answer program in Italian within the "Italian Melodies" program. The president of WSTC, it has been concluded, was remiss in not exercising adequate control over the general manager so as to prevent the latter's discriminatory censorship even though the general manager's policy of review of candidates' script was known to him. However, the president had no knowledge of the other discriminatory actions.

58. Through the general manager's failure to supervise and review the maintenance of WSTC program logs and a list of purchasers of political time on WSTC, repeated violations of the logging requirements of Sections 73.112 and 73.282 of the Rules and of the political file requirements of Sections 73.119(f) and 73.289(f) of the Rules on a wholesale scale occurred during the 1969 general election. The president of WSTC apparently was not aware of these violations.

59. While it has been found that the general manager of WSTC both before and during the hearing made statements which were untrue, it has been concluded that he did not make deliberate misrepresentations in his prehearing statements or prevaricate in testifying. So too, it has been concluded that the president of WSTC did not knowingly and wilfully misrepresent or lack candor in making certain statements to the Commission before the hearing which have been found untrue. However, he made one misstatement before the hearing, which stemmed from irresponsibility and constituted careless exaggeration.

60. The question of whether the licenses of Stations WSTC–AM and FM should be revoked in view of the extensive violations of Section 315(a) and the various regulations pertaining to censorship, equal opportunities, logging and political listing found in this proceeding is not easy to resolve. Obviously political censorship and unequal treatment of competing candidates for an important public office cannot be taken lightly. In this case, they prevented all but one of the Stamford mayoral candidates in 1969 from having unhampered access to the ears of voters and resulted in preferential treatment in this and other ways among the candidates. The consequences of the licensee's misconduct were magnified by its control of the only broadcast facilities in Stamford. Indeed, as the Broadcast Bureau has stated, although in a different context, there was a serious breach of the licensee's public trust.

61. The censorship and discriminatory violations were committed by the general manager of the stations. The logging violations and the sponsorship listing violations are also chargeable to him in that

he failed to exercise adequate supervision over the areas of operation to which they related. However, ultimate responsibility for the censorship and unequal treatment of candidates must be laid at the door of the president and controlling stockholder of the licensee who, as the chief executive officer in turn failed to exercise adequate control over the activities of the general manager and ignored danger signals which should have caused him to inquire into the manner in which political candidates were being handled by the general manager.

62. Countervailing considerations point to the conclusion that the licensee should be permitted to continue with its stewardship of the WSTC stations. Whereas the violations have been found with regard to a particular facet of the station's programming, the overall programming of the stations has been shown to be meritorious, according to a study of the 1969 and 1970 composite weeks' fare. WSTC maintains an outstanding news service with much attention to local news, and it has rendered superior service in its public affairs programming. The WSTC stations have each been serving Stamford under the licensee's ownership for about a quarter of a century and, judging from the notable records of programming for the 1969 and 1970 composite weeks, they have served the community very well.

63. Further, it has not been established that the preferential treatment accorded the successful Republican candidate for mayor resulted from any plan or intention to favor this candidate. Indeed, there is not a scintilla of evidence that the actions of the station's general manager during the 1969 election campaign were politically motivated. Nor does it appear that any political considerations entered into the conduct of the president of the licensee with respect to the treatment of the mayoral candidates. The censorship which did occur resulted from a desire to have the political broadcasts conform with the standards of "good taste" as conceived by the station's general manager.

64. Moreover, with the exception of one instance in which the president of WSTC indulged in inexcusable exaggeration, there was no intentional misrepresentation or lack of candor manifested by either the general manager or the president of WSTC in responding to Commission inquiries. Mr. Kingsley Gillespie, the licensee's president, did not participate in the 1969 election campaign violations and was not aware that Julius Schwartz was requiring deletions from candidates' political scripts over their objections. Gillespie did not know that it was illegal to require submission of political scripts for review in advance of broadcast.

65. As the Commission indicated in *Continental Broadcasting, Inc.*, 15 F.C.C. 2d 113, 131 (1968), a licensee's promises for the future have some bearing although it must be judged even more on the basis of its past. Accordingly, being taken into account with reference to the question of revocation are the extensive corrective measures taken by the licensee. The former general manager of the stations who served in that capacity from about 1947, has been retired from his post. In recent elections there has been no censorship of any kind by the WSTC stations. The president of the stations has taken a considerably more active role in overseeing their operations. Communications counsel have been engaged to advise in the running of the stations. The new general manager, who testified at the hearing,

has instituted procedures to forestall any repetition of the logging and listing violations. A recurrence of the violations which led to this hearing is most unlikely, particularly under the leadership of a much younger general manager.

66. While recognizing there were flagrant violations of the censorship prohibition of Section 315(a), some instances of unequal treatment of candidates, and numerous violations of logging and listing requirements, the considerations discussed above have tilted the determination on the revocation question in the licensee's favor. It is concluded that the licensee is qualified to continue the operation of the WSTC stations. *Continental Broadcasting, Inc., supra*, relied upon by the Bureau, does not require a different result. There, gross and wilful fraud on the Commission was committed, and meritorious programming in mitigation was not shown.

67. At the same time, the Section 315 violations cannot be lightly dismissed. While their effect upon the 1969 mayoral election cannot be assessed, they were an intolerable departure from the standards of conduct in the area of political broadcasting laid down by the Communications Act and the Commission's regulations. Political censorship and unequal treatment of political candidates, no matter what the reasons, "subvert the democratic process" and merit the most severe censure. Moreover, as the Commission held in the *Continental case*, "a licensee must be held responsible for the gross misconduct of the station manager where it has been clearly established that the licensee failed to exercise adequate control and supervision over the station consistent with its licensee responsibilities." That ruling applies to the circumstances of the present case in which the president and controlling stockholder was derelict in meeting his and the licensee's responsibilities of control. For the wilful and repeated serious violations which are reflected by the findings, a forfeiture penalty of not less than the maximum sum is warranted.

In view of the foregoing, IT IS ORDERED, That, unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion, in accordance with the provisions of Section 1.276 of the Rules, the above-captioned Order To Show Cause IS DISCHARGED.

IT IS FURTHER ORDERED, That Western Broadcasting Company, licensee of Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM, Stamford, Connecticut, SHALL FORFEIT the sum of ten thousand dollars ($10,000), the forfeiture to be paid within 30 days after this Initial Decision becomes final, by mailing to the Commission a check, or similar instrument, in the amount of ten thousand dollars ($10,000), drawn payable to the Treasurer of the United States.

FEDERAL COMMUNICATIONS COMMISSION,
ISADORE A. HONIG, *Hearing Examiner.*

Commission Decision

UNITED STATES OF AMERICA

FEDERAL COMMUNICATIONS COMMISSION

Washington, D. C.

I, Vincent J. Mullins, hereby certify that the attached is a true and correct copy of the following document on file in this Commission, and that I am official custodian of the same:

Decision, F.C.C. 73-1074, Adopted: October 17, 1973; Released: November 7, 1973, In the matter of: Revocation of the Licenses of Western Connecticut Broadcasting Co. for Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM, Stamford, Connecticut, Docket No. 19043, 43 F.C.C. (2d) 730.

IN WITNESS WHEREOF, I have hereunto set my hand, and caused the seal of the Federal Communications Commission to be affixed, this twenty-second day of July, 1976.

Vincent J. Mullins
Secretary

F.C.C. 73-1074

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of REVOCATION OF THE LICENSES OF WESTERN CONNECTICUT BROADCASTING CO. For Standard Broadcast Station WSTC and FM Broadcast Station WSTC-FM Stamford, Conn.	Docket No. 19043

APPEARANCES

Thomas H. Wall, B. Dwight Perry, and *Susanne Meyer,* on behalf of Western Connecticut Broadcasting Company; and *Gerald M. Zuckerman* and *Katherine Severs McGovern,* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.[1]

DECISION

(Adopted October 17, 1973; Released November 7, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE ABSENT; COMMISSIONER H. REX LEE DISSENTING AND ISSUING A STATEMENT IN WHICH COMMISSIONER JOHNSON JOINS; COMMISSIONER WILEY CONCURRING IN THE RESULT.

1. On October 8, 1970, the Commission directed Western Connecticut Broadcasting Corporation (Western) to show cause why its licenses for stations WSTC and WSTC-FM, Stamford, Connecticut should not be revoked (FCC 70-1093). The Commission further stated that, if it was determined that Western's licenses should not be revoked, the Administrative Law Judge should then decide whether a monetary forfeiture should be imposed on Western.

2. The Commission designated issues to determine whether Western had censored political broadcasts, had failed to afford equal opportunities to all political candidates for the same office, had violated certain record keeping and logging requirements of the Commission's rules, and had misrepresented facts to the Commission, and ultimately whether Western possesses the requisite qualifications to remain a licensee. Subsequently, the Review Board added an issue to determine whether the station's programming had been meritorious (26 FCC 2d 1019). On June 9, 1971 (FCC 71-603), the Commission denied Western's December 7, 1970, Petition for Reconsideration of the Show Cause Order, in which Western contended that a hearing was unnecessary but admitted that violations of the Communications Act and the Commission's Rules warranted a monetary forfeiture.

[1] Melvin M. Dichter appeared on behalf of Julian Schwartz, a witness in this proceeding.

3. Hearings were held in October and December of 1971; and on August 4, 1972, Administrative Law Judge Isadore Honig released an Initial Decision in which he concluded that Western had illegally censored political broadcasts, had failed to provide equal opportunities to political candidates, and had committed logging and record keeping violations. With regard to the misrepresentation issue, the Judge concluded that although principals of Western had made statements that did not conform to what he found to be the facts, the statements were not deliberate misrepresentations. He also determined that the programming of WSTC had been meritorious. He concluded that, although Western had been derelict in carrying out its responsibilities, it was qualified to continue to operate the stations; and that revocation was unwarranted.[2] For willful or repeated violations of the Act and the Commission's Rules, he assessed the maximum monetary forfeiture of $10,000. The Broadcast Bureau filed exceptions to the Initial Decision and argues in essence that the misrepresentations made by Western's principals were deliberate and that Western lacks the qualifications to be a Commission licensee. Western filed limited exceptions; basically it supports the Initial Decision.

4. The findings of fact of the Judge are substantially correct, and we adopt them except as they are modified in this decision and in our rulings on exceptions. We also adopt the Judge's conclusion that there were violations of the censorship and equal opportunities provisions of Section 315, although we disagree with two instances in which the Judge concluded that the equal opportunities provision had been violated. No exceptions were taken on the issues of logging and maintenance of public files. We have been seriously troubled by the evidence on the issue of misrepresentations; but we have reached the conclusion, as did the Judge, that there were no deliberate misrepresentations.

5. Briefly summarized, the events out of which this case arose are as follows: During the 1969 Democratic primary and the general election campaigns for Mayor of Stamford, Connecticut, the general manager of the licensee (Julian Schwartz) had required all the candidates, except the Republican candidate for mayor, to submit for review advance scripts of their paid political announcements and programs which they wanted to broadcast over WSTC.[3] In addition on six different occasions Schwartz deleted from the scripts of the Democratic candidate for Mayor material which Schwartz deemed objectionable. Schwartz also deleted material from three scripts of the Fusion Party candidate. On the few occasions when the candidates vigorously opposed the deletions, Schwartz told them the changes would be made or the candidates would not go on the air.

6. The deletions were required by Schwartz in order to preserve the "image" of the stations, which were described as his "shadows" and which he had strived for almost 25 years to build into respected

[2] Western's license term expired on April 1, 1972, and Western continues to operate pursuant to Section 307(a) of the Communications Act while its renewal application is being held in abeyance.

[3] The programming of WSTC is duplicated on WSTC-FM during those times relevant to the designated issues. Reference to WSTC is therefore intended to refer to both stations

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community voices.[4] (Pet. for Reconsideration, para. 14). The standard which Schwartz used in determining whether deletions were necessary was that of "good taste" and the arbiter of good taste was Schwartz. Material was not in good taste if it involved name-calling, a person's reputation, or an exaggeration, or seemed otherwise objectionable. Most of the material which Schwartz deleted from the candidates' scripts consisted of arguments and allegations which one would expect to be made in any political campaign.

7. The President, Treasurer, and 51.6% owner of Western (Kingsley Gillespie) knew that Schwartz was requiring the submission of scripts. Both believed mistakenly that the requirement of prior submission of scripts was permissible. There was a modicum of substance for the erroneous belief that the submission of scripts could be required. The Catechism issued by the National Association of Broadcasters in 1968, which Schwartz testified he had read, gave him the incorrect impression that an advance script could be required because it was permissible to try to persuade candidates to delete obscene or defamatory material. Nevertheless, the Commission's Primer published May 4, 1966, entitled "Use of Broadcast Facilities by Candidates for Public Office" (31 Fed. Reg. 6660) plainly prohibited the prior submission of scripts (VII, Q. and A. 7). Schwartz had "looked through" the Commission's 1966 Primer several times (Tr. 142) and had read it prior to the 1969 campaign (Tr. 144) although how long before the campaign is not a matter of record. The licensee had an obligation to be aware of the Commission's implementation of the requirements of law and, had Schwartz been performing his duties properly, he would have sought advice with respect to what should have seemed an about-face in the Commission's position on prior submission of scripts. He chose to proceed without advice. Gillespie's reliance was misplaced with respect to Schwartz's knowledge of the requirement of law; but Gillespie chose to rely on Schwartz rather than seeking advice of counsel or involving himself in the question of conformity of station policy with the requirements of Section 315. He approved the requirement of prior submission and thus imperiled the license.

8. We believe also, as did the Judge, that the deletions made or required by Schwartz were done willfully. Both Schwartz and Gillespie testified that they understood anything beyond persuasion was not permitted. Gillespie did not know that Schwartz was deleting material; but contrary to Western's argument, the licensee must bear responsibility for Schwartz's willful misconduct because Gillespie failed to exercise adequate supervision over his general manager. The record shows Gillespie repeatedly reminded Schwartz about treating the candidates equally; in contrast, Gillespie and Schwartz apparently had not had a discussion with respect to censorship since the late 1940s. Gillespie testified that he had told Schwartz in the late 1940s, and they had an understanding, that Schwartz "has a right to look at the scripts and suggest to the candidate what was not in good taste, but he had no power to force [the candidate] to change it." Gillespie con-

[4] The record reflects that Schwartz was diligent and sincere in trying to make the station a good operation in terms of programming. He had worked hard to build up the station. Even at the age of 68, he was at the station regularly seven days a week and rarely took a vacation.

sidered the understanding one "that didn't need reminding of" (Tr. 73). On such an important matter, the prolonged lack of scrutiny or specific reminder certainly constitutes a lack of supervision by the licensee. The licensee cannot escape culpability for its general manager's deliberate violations of the law.

9. The Judge also correctly concluded that Schwartz's review and censorship of the scripts of two of the three candidates in the general election not only was a violation of the prohibition on censorship, but also constituted a violation of the equal opportunities provision of Section 315. We think this is a correct application of the law in this case. The statute requires equal treatment and prohibits censorship. Here the censorship, which in itself was illegal, had the effect of favoring one candidate, which also was illegal.

10. We agree with Western, however, that the Judge incorrectly concluded that the equal opportunities provision was violated when the licensee invoked its policy against back-to-back political ads and offered the Fusion Party candidate time at 6:55 p.m. when his requested time at 6:29 p.m. had already been sold to the Republicans. The 6:29 time was adjacent to the local news; the 6:55 time was adjacent to the national news. The Judge reasoned that the licensee should have foregone its policy against back-to-back political ads as was done subsequently on the night before election. We think that Schwartz's policy was a reasonable one, that Schwartz complied with Section 315 by providing reasonably comparable time, and that it was not necessary to waive the station's policy.

11. Schwartz's policy of requiring a minimum separation between announcements of opposing candidates was adopted to assure that each announcement would have maximum effect. Hence, it was not improper for Schwartz, in offering the Fusion Party candidate time slots for his broadcast, to adhere to the minimum separation policy, as long as the time offered was reasonably comparable to that afforded the Republicans. The 6:55 time offered was as close to the local news as the separation policy would permit. Moreover, we do not believe that Schwartz was obliged to waive the separation policy in order to afford time closer to the 6:30 local news. A waiver of the policy when the campaign for the general election was just beginning would have required the granting of subsequent waivers to other candidates and would have nullified the station's separation policy. The Broadcast Bureau notes that Schwartz did waive the policy on election eve in order to accommodate all the candidates' requests for time. We believe, however, that the situations are readily distinguishable. At the beginning of the general election campaign, it was possible to offer the Fusion Party candidate a choice of several time slots and still maintain the separation policy. On election eve many of the announcements could not have been broadcast at all without a waiver of the policy. As the licensee explained, the policy was lifted the night before the election in order to afford all candidates time at the crucial point in the election.

12. We also agree with Western that the Judge incorrectly concluded that the equal opportunities provision was violated by Schwartz's permitting the supporters of the Republican candidate to have political announcements read by the regular announcer during a

musical program, and by the announcer's pronunciation of the names of the sponsors and their region of origin in Italian. Schwartz had previously forbidden the Fusion Party candidate to present a question and answer program in Italian or to have the announcer for the program participate as the questioner for the same program in English. Schwartz's reason was that to do so would have violated the station's policies against foreign language programs and against permitting employees to participate in political programs unless all candidates were on the program. Western argues that Section 315 is inapplicable because the Republican candidate did not himself appear on the program. We agree. Use of the facilities by supporters of a candidate does not create the obligation of providing equal opportunities.[5] We therefore must conclude that Western did not violate the equal opportunities provision of Section 315 when it allowed its employee to read political announcements and to use the Italian pronunciation of names and places on a special musical program in support of the Republican candidate.

13. In making his determinations on violations of Section 315, the Judge did not consider the testimony of one Sheldon, who in 1968 had been a candidate for offices other than mayor. The Judge ruled that the testimony of Sheldon as to censorship of his scripts in 1968 and as to his complaints to Schwartz and Gillespie could be used only in connection with the charges of misrepresentation by Schwartz and Gillespie. The Judge based his ruling on the fact that the bill of particulars, prepared by the Broadcast Bureau after the designation for hearing, alleged censorship only during the 1969 campaign and did not refer to any 1968 campaign. This ruling is erroneous. First, the scope of the issues is established by the designation order, not the bill of particulars. See *Chronicle Broadcasting Co.*, 20 FCC 2d 33, 39, n. 11. Second, although the 1968 campaigns were not included in the specifications of the bill of particulars, the licensee was advised prior to hearing that Sheldon would be a witness; the licensee knew that Sheldon had been a candidate for public office in 1968 and had used Western's facilities for political broadcasts. Moreover, and most important, the licensee knew on September 16, 1971, a month prior to hearing (which began October 19, 1971), that Sheldon had asserted that he had complained of censorship. (Western Ex. 2, p. 5)[6] Thus, the licensee can reasonably be said to have had notice that censorship in 1968 was at issue and to have had an opportunity to meet the charge. Sheldon's testimony as to censorship is a matter of record; the judge accepted Sheldon's testimony as truthful; and we conclude on this record that the licensee was also guilty of censorship in 1968.

14. One more element with respect to the Section 315 violations must be decided: whether Schwartz was politically motivated. Because Schwartz's actions favored the Republican candidate, the Bureau ex-

[5] The more flexible Fairness Doctrine would apply (see the last sentence of Section 315(a)) and would require an examination of the opportunities the licensee afforded for discussion of the various candidacies. The Show Cause Order did not allege, the Bureau does not claim, and the record would not support a charge that the licensee violated the Fairness Doctrine in its coverage of the candidates and issues in the campaign. For application of the Fairness Doctrine in instances of the appearance of supporters of a candidate for political office, see the Commission's letter of June 3, 1970, to Nicholas Zapple, Communications Counsel, Committee on Commerce, 23 FCC 2d 707.

[6] In a letter dated September 28, 1971, to the Commission, Gillespie stated that he first learned of Sheldon's allegations on September 16, 1971.

cepts to the conclusion that Schwartz was entirely lacking in political motivation. The censorship of the other candidates did in fact favor the Republican candidate in violation of Section 315; the Judge so found: and we agree. The Bureau, however, specifically disclaims a charge that the censorship was politically motivated but argues only that favoritism to the Republican candidate was politically motivated. Schwartz explained that he did not review the Republican's scripts because he felt from other utterances of the candidate that his script would not offend "good taste" (Tr. 213); an employee of the station independently and on his own time was assisting the Republican candidate, and Schwartz knew that the employee understood the station's standards (Tr. 212); the scripts for the Republican were prepared professionally with the assistance of a man whom Schwartz knew personally and in whom he had complete confidence (Affidavit of Julian Schwartz dated December 4, 1970 accompanying Western's Petition for Reconsideration.) We accept these explanations as consistent with Schwartz's effort to maintain the station's image. As to other actions of Schwartz which the Bureau alleges favored he Republican there was no unfairness in the adherence to the station's separation policy. (See para. 11, *supra*.) There was a reasonable distinction between letting a station employee read political spot announcements during a musical program sponsored by a candidate's supporters (which Schwartz permitted) and letting a station employee read questions which a candidate would answer during an interlude in the musical program (which Schwartz did not permit). There was also a reasonable distinction between the independent participation of one employee in Republican announcements prepared on his own time and at his own choice and Schwartz's denial of the Fusion Party candidate's request to use an employee in a question and answer format during an interlude in the employee's regular musical program. The substance of Schwartz's ordering the station's announcer to use the Italian pronunciation when reading the names of the Republican's supporters and their place of origin is simply not enough to support a conclusion of a plan or intention arising from political bias. And there was no evidence to link the Gillespie-owned newspaper endorsement of the Republican on the Saturday before the election with Schwartz's conduct. Moreover, when the sister of the Democratic candidate complained about a Republican announcement, Schwartz listened to it, found it in bad taste ("name calling"), and took it off the air.[7]

15. The conclusion which has given us the greatest difficulty is that on the issue of misrepresentation. We are seriously troubled with what appear to be gross contradictions between the facts as found by the Judge and the statements made by Schwartz and also with the instance in which the Judge found that Gillespie had engaged in an "inexcusable exaggeration." The Judge concluded that neither Gillespie nor Schwartz had deliberately misrepresented. Although he discredited Schwartz's statements in almost every instance of controversy, the Judge also specifically concluded that Schwartz was trying to tell the truth.

[7] There was no evidence that the Fusion Party candidate ever complained about the good taste of the announcements of the other candidates or that Schwartz would have refused to remove remarks about the Fusion Party candidate which were in "bad taste."

16. We think the evidence and the reasonable inferences are so nearly in balance that resolution either way would leave us with some sense of uncertainty. Nevertheless, a decision must be reached. This is a revocation proceeding; the burden of proof was on the Bureau; and we have therefore given the benefit of the doubt to the licensee.

17. Gillespie was charged with misrepresentations on three occasions. The first was his assertion in an affidavit filed with the December 4, 1970 Petition for Reconsideration that he was "shocked and distressed" to learn that during the 1969 campaign Schwartz was accused of requiring the deletion of spots. The Broadcast Bureau argues that Gillespie was well aware of Schwartz's practice of deleting material from paid political announcements over the candidates' objections and that therefore he could not truly have been shocked when told of the accusations against Schwartz. The Administrative Law Judge held, however, that there was no adequate basis for concluding that Gillespie misrepresented or lacked candor when he claimed to have been shocked. The Judge reasoned: (1) Gillespie was told by Schwartz that he attempted only to persuade the candidates to make changes and that the candidates always acceded to his persuasion; (2) Gillespie never participated in nor witnessed any of the arguments between Schwartz and the candidates; (3) Schwartz himself could not remember having told Gillespie that Schwartz had received complaints concerning his handling of paid political announcements; (4) prior to 1969 there had been no allegations of censorship against Schwartz, whose reputation was of the highest order and upon whom Gillespie relied "totally" (Tr. 101); (5) Gillespie testified that he specifically instructed Schwartz that if a candidate refused to delete material, the candidate must still be allowed to broadcast his political announcement; and finally (6) there is no cogent evidence that in 1968 Ralph Sheldon, in complaining to Gillespie of Schwartz's censorship, stated that Schwartz had made deletions over his objections.* We agree with the Judge's conclusion that Gillespie was unaware of Schwartz's actions in deleting material from political candidates' scripts and that Gillespie did not misrepresent to the Commission when he stated that he was shocked when he learned that Schwartz had been accused of such conduct. At the same time we also agree with the Judge that Gillespie did have notice that Schwartz might be engaging in improper conduct with regard to the candidates and their scripts, and that Gillespie's failure to fulfill his responsibility to exercise sufficient oversight of Schwartz to insure that the statute and the Commission's Rules were observed reflects adversely on the licensee.

18. A second statement which was alleged to be a misrepresentation was part of a September 28, 1971, affidavit submitted to the Commission by Gillespie. Gillespie stated that Ralph Sheldon, a candidate for office in 1968, had, prior to September 16, 1971, never complained to Gillespie that Schwartz had censored his paid political announcements broadcast on WSTC. The Judge found that contrary to this statement, on a number of occasions prior to September 16, 1971, Shel-

*We also note that Gillespie dismissed the Fusion Party candidate's unreviewed addendum, broadcast at the end of his censored script the night before election, as "something that you expect a candidate to do the night before election." (Tr. 689-690)

don had complained to Gillespie of censorship by Schwartz. The Judge noted, however, that Gillespie had not been inclined to pay serious attention to Sheldon, and concluded that "this and attendant circumstances" suggest that Gillespie in 1971 did not recall Sheldon's complaints of censorship in 1968 and therefore Gillespie did not knowingly and willfully misrepresent when he denied them. The "attendant circumstances" alluded to by the Judge were the following: Sheldon's visits with Gillespie were short—the longest one was five to six minutes and the others occurred when Sheldon unexpectedly arrived at the door of Gillespie's office and conversed with Gillespie for a minute or so; and during these visits, Sheldon engaged in various antics such as reciting poetry and doing push-ups while talking to Gillespie rapidly about a number of subjects. Gillespie's testimony shows that he paid little attention to Sheldon's comments which were interspersed among the antics. It is not improbable on the evidence that Gillespie was being truthful in denying Sheldon had complained. He probably did not remember Sheldon's complaints.

19. The third statement in which Gillespie is alleged to have made misrepresentations to the Commission is contained in Western's Petition for Reconsideration,[9] which stated that Gillespie did not learn of candidates' complaints of censorship until "long after the fact." At the hearing, Gillespie's attention was directed to this statement, and he was asked when Schwartz told him of the addendum to the script broadcast by the Fusion Party candidate the night before election, in which the licensee was charged with censorship. Gillespie stated that Schwartz had informed him of the incident about two or three days after it occurred, and Gillespie further stated that this is what he had reference to in the Petition for Reconsideration. The Administrative Law Judge found, however, that Schwartz had informed Gillespie of the addendum the morning after it was broadcast and concluded that Gillespie's statement in the Petition for Reconsideration was "an inexcusable exaggeration," though not an intentional misrepresentation. Although not without doubt, we believe this conclusion is supportable. First, in these circumstances the time differential between two or three days and the following day is not significant. The significant fact is that Gillespie did not learn of the addendum until after the campaign. Second, an examination of Gillespie's testimony reveals that he was not certain as to precisely when particular events took place, and this was understandable for events which he had not considered significant when they occurred. Thus, Gillespie first testified he was told about the addendum the day after it was broadcast.[10] (Tr. 74) After being shown the Petition for Reconsideration, he said the "long after" meant 2 or 3 days (Tr. 125). Subsequently, he testified that he had given a great deal of thought to refresh his memory on the point and his best recollection was that he learned of the addendum two or three days later (Tr. 688–689).

[9] In an affidavit attached to the Petition for Reconsideration, Gillespie stated that the facts set forth in the Petition were true and correct to the best of his knowledge and belief.

[10] The Judge makes a finding to that effect but does not discuss it specifically in his conclusions.

20. We think it is also relevant to note the circumstances in which this statement was made. The Petition for Reconsideration was filed after issuance of the order to show cause. The licensee was seeking to avoid a hearing by admitting violations of Section 315 and the cited Commission rules and by arguing that it was unaware of the admitted misconduct. Therefore, at the time the Petition was filed, there was reason to emphasize only that Gillespie had not known about the deletions at the time they took place and it would have been unimportant whether he became aware of the complaint a day or a week or a month later. Thus, although he affirmed the truth of the contents of the Petition for Reconsideration, there is no suggestion that the phrase "long after" connoted any more to him at that time than that his knowledge of the charge of censorship was acquired too late to prevent the misconduct. As the Judge observed, however, before affirming such a statement, Gillespie should have searched his memory or checked with Schwartz to refresh or confirm his recollection of the event. His failure to do this and his use of the term "long after" to mean 2 or 3 days, shows an element of irresponsibility. But it does not, we think, show that degree of negligence equatable with deliberateness. We think, therefore, that the Judge correctly absolved Gillespie of deliberately making a misrepresentation.

21. Before reaching his conclusions with respect to Schwartz, the Judge admitted that resolution of the question was difficult. In June 1970 in a statement prepared by FCC investigators on the basis of his answers to questions, Schwartz denied censoring the Fusion Party and Democratic candidates or deleting material from their announcements. In a September 1970 statement to investigators, he again denied censoring the scripts although he had the Independent's script before him. He also denied that he threatened to bar the Fusion Party candidate from the air if he did not remove objectionable material. These statements do not correspond to the facts. In his June 1970 statement Schwartz asserted that the names of a candidate's supporters had been pronounced in Italian without his permission. In fact, he directed the announcer to do so. In a December 1970 affidavit filed as part of the Petition for Reconsideration, Schwartz acknowledged that he might have insisted upon deletions in the scripts of the Fusion Party and Democratic candidates for mayor and that he might have made the deletions a condition of the use of the station's facilities. But he also stated that he had no independent recollection of either making or insisting upon deletions. At the hearing Schwartz consistently maintained that he did not require these candidates to make deletions and that all deletions were made with their concurrence. The facts show these contentions to be untrue. That these contentions have been found to be untrue does not, however, answer the question of whether Schwartz was making untrue statements with knowledge of their falsity.

22. The Judge recognized that Schwartz at the times of his statements and testimony would have had a strong motive to misrepresent the facts in order to preserve his unblemished record as a station manager. Yet the Judge specifically concluded that Schwartz was attempting to tell the truth as best he could and that he was not deliberately misrepresenting.

23. The Broadcast Bureau argues that Schwartz was consistently lying. The licensee argues that Schwartz's age, his health and personal problems, and the labor negotiations in which he was participating for the first time in 1969 combined to place him under such stress that his conduct was aberrational and not in character. The Judge refused to accept the licensee's argument of aberrant conduct and we agree. The evidence shows that Schwartz censored Sheldon in 1968 and there is no suggestion that the combination of stressful conditions alluded to by the licensee as existing during the 1969 campaign were present in 1968. We do think, however, that although Schwartz was aware of his conduct at the time the incidents happened in the fall of 1969, his subsequent recollection of those events for the first time eight months later could well have been affected by the factors argued by the licensee.

24. The Judge arrived at his conclusion that Schwartz "did not engage in deliberate misrepresentation in his prehearing statements or in prevaricating in giving his testimony" by relying on his observation of the witness's demeanor and on Schwartz's responses indicating he had a poor recollection or no recollection of many events, although he did remember some. With respect to the particulars of sessions with the candidates, which Schwartz did not recall, the Judge relied on the doctor's testimony that Schwartz in the latter part of 1969 was suffering from ailments attributable to anxiety and tension, and that stress affects the ability to concentrate so that events do not register on one's mind.

25. The record discloses other reasons which taken together explain why Schwartz's recollection may have been distorted and why as to some events there should be complete absence of memory. Schwartz was 68 in 1969 when his confrontations with the candidates took place. He had been general manager for 23 years with absolute control of day-to-day operations. He was in a position of absolute power, confirmed by Gillespie's referring Sheldon's complaints back to Schwartz. He believed he could properly review the candidates' scripts and persuade them to delete material. Some of his suggestions related to matters of grammar or expression rather than content. He was trying to improve the candidates' scripts for them while primarily preventing any "objectionable" material from going over the air to the damage of the station's "image." Some suggestions were accepted by the candidates without any or any serious opposition. Schwartz's perception of those occasions might be that he had succeeded in persuading the candidates. He denied having forced the candidates to make changes in their scripts. He acknowledged that on occasion the candidates disagreed with his suggestions, but he testified he was always able to "convince" them to make the suggested changes and they "invariably went along." (Tr. 146). The candidates' testimony reveals that they did in fact always eventually acquiesce in making the changes in their scripts. It is not improbable, given these circumstances, that in fact Schwartz did believe in retrospect that he had not forced the changes on the candidates. In some instances, moreover, there was heated opposition by the candidates. The record strongly suggests that Schwartz, by virtue of his absolute power, was not accustomed to opposition in managing the station. The heated arguments would

themselves create an additional immediate stress which could account for Schwartz's failure to remember any threats he had made in the course of the arguments.

26. Thus, it is not capricious on this record to believe Schwartz's honesty in stating, upon reconstructing the encounters some eight months later: (1) that he did not recall any deletions or threats and (2) that he had always succeeded in persuading the candidates. Beyond what is on the cold record, however, we have the Judge's specific conclusion that "[t]he overwhelming impression created by Schwartz's testimony is that the misstatements made by him were the product of faulty recollection rather than intentional untruthfulness."

27. The Judge's conclusion that Schwartz was testifying honestly must be given great weight because the Commission has had no opportunity to observe the witness. The Bureau objects to the use of demeanor in this context and argues that it is useful only in resolving conflicts in the testimony. The Judge used demeanor for two purposes: (1) to determine what the facts were, and (2) to determine the honesty of the witness. The Judge determined that Schwartz's testimony was not to be credited as against the specific, detailed, contradictory testimony of other witnesses. We do not think, however, that that conclusion precludes the separate conclusion that Schwartz was trying to testify honestly. As between conflicting testimony, Schwartz's was found to be not true. But on the question of deliberate falsity in his testimony, it is not inconsistent to conclude that Schwartz was not a perjuring witness.

28. We recognize that the crucial point under the misrepresentation issue is whether Schwartz deliberately lied in his prehearing statements to Commission investigators, and not whether his testimony at the hearing was false. Hence, it might be argued that the Judge's observance of Schwartz's demeanor at the hearing is irrelevant to his state of mind at the time he responded to the Commission inquiries. In this case, however, we believe that the Judge's conclusion that Schwartz did not deliberately misrepresent at the hearing also supports a conclusion that Schwartz did not deliberately misrepresent in his affidavits. Schwartz at the hearing essentially repeated the statements which he had made in his previous affidavits; he denied making deletions and threats (as he had done in his first two affidavits) but he also said (as he did in his December 1970 affidavit) that he could have and probably did (even testifying to a deletion he did *not* make). In his December 1970 statement, which was intended to amend his first two statements, Schwartz said he could not deny that he made deletions or made them a condition for use of the station; he emphasized repeatedly that he could not remember doing so; and he said he was relying on the memory of others as to what transpired. We think that Schwartz's testimony and December 1970 affidavit are not essentially inconsistent taken in context. Although the decision is troublesome, we are willing in this close case to rely on the Judge's evaluation of Schwartz's honesty and to conclude that Schwartz's misstatements were the result of a failure of memory. We conclude, therefore, that Western has not been guilty of misrepresentations.

29. Clearly, however, Western has been guilty of numerous violations of both Section 315 and the Commission's Rules. The violations

of Section 315 and the corresponding Commission Rules are grievous. The licensee controls the only radio stations in Stamford and, by censoring the candidates who bought time on the stations, interfered with the free flow of information to the electorate. We would be warranted in revoking the licenses for willful and repeated violations of Section 315, absent any mitigating factors.

30. The final question for consideration thus is whether the grievous violations of Section 315 are mitigated by the overall programming of the licensee. The Judge made findings on the licensee's record for the composite weeks of 1969 and 1970 and also on a comparison of the licensee's 1969 and 1970 composite weeks with the most recent composite week (1968) on file with the Commission of 45 other Class IV radio stations in the New England States and New York State. The Broadcast Bureau does not challenge the findings on programming that appear in paras. 113–149 of the Initial Decision. Approximately 30 percent of total air time in the 1969 composite week and 28 percent in the 1970 composite week was devoted to news. These percentages included approximately 12 percent of total air time each composite week devoted to local news. The licensee ranked first in 1969 and second in 1970 on total time devoted to news, and ranked first in both years in percent of time devoted to news. We think that the use of comparative figures may have some value in deciding the issue, but should not be the conclusive criterion for determining "meritorious" programming. A station could rank first among statistically comparable stations and therefore be above average but still not meet a standard of public service that would enable the licensee to avoid revocation. Here, however, the record shows figures for programming in non-entertainment categories that (except for public service announcements) demonstrate an effort to serve the public.

31. We think that, despite the shortcomings in the licensee's PSA performance, the other significant areas of performance warrant the conclusion that the licensee's programming in the field of public affairs reflects close attention to the goal of a well informed electorate and to the needs and interests of various community organizations. We conclude, therefore, that the overall programming was good enough to tip the scales against revocation and to permit a conclusion that Western is qualified to remain a licensee; however, we also conclude that the misconduct was so serious that we shall impose the maximum permissible fine of $10,000.

32. Our determination on the mitigating effect of the overall programming is made with these caveats: (1) it resolves only this revocation proceeding; (2) it does not establish or forecast the Commission's position with respect to any policy on programming standards that may ultimately result from the Commission's inquiry into the matter of "superior past programming" which might give a renewal applicant a "plus of major significance" in comparison with a competing applicant (Docket No. 19154, 31 FCC 2d 443, released August 20, 1971); and (3) our determination here on the programming issue does not necessarily create for this licensee a preferred position in any comparative proceeding concerning its renewal application. Finally, we note that this proceeding will become part of the licensee's file and this

opinion thus properly may be considered when action is taken on the licensee's renewal application.

33. THEREFORE, IT IS ORDERED, That Western Connecticut Broadcasting Company, licensee of Stations WSTC and WSTC-FM, FORFEIT to the United States the sum of $10,000.00 for violations of the Communications Act of 1934, as amended, and of the Commission's Rules as shown in the above Decision. Payment of the forfeiture may be made by mailing to the Commission a check or similar instrument drawn to the order of the Federal Communications Commission.

FEDERAL COMMUNICATIONS COMMISSION,
VINCENT J. MULLINS, *Secretary.*

APPENDIX

Rulings on Broadcast Bureau's Exceptions to Initial Decision

Exception No.	*Ruling*
1	Denied. Although Schwartz could not recall the exact words of the NAB's Catechism, a reasonable inference from the record is that he had interpreted it to mean that candidates could be required to submit scripts in advance, otherwise there would have been no opportunity to persuade them to delete obscene or defamatory material, as the Catechism stated he could do.
2, 6	Denied. Decisionally insignificant.
3, 15	Granted. See para. 13 of this Decision.
4	Denied. The finding in n. 15 that Sheldon did not specifically inform Gillespie that Schwartz was deleting material from Sheldon's scripts accurately reflects the record.
5	Granted. Schwartz's statement that he had confidence in the Republican candidate to conduct a campaign in good taste and in the person who was assisting him in the preparation of his announcements appears in Schwartz's Affidavit dated December 4, 1970, accompanying Western's Petition for Reconsideration, and not, as the Judge found in n. 18, in Schwartz's June 19, 1970 statement.
7	Denied. In para. 48 the Judge found that Gillespie testified that Schwartz informed him of the Fusion Party candidate's addendum the morning after it was broadcast. The Commission considered this finding in its discussion of the alleged misrepresentation. See paras. 19 and 20 of this Decision.
8, 20	Denied. See paras. 19 and 20 of this Decision.
9	Granted in part and denied in part. Granted to the extent that the word "[p]ossibly" in the penultimate sentence in para. 101 is struck, and to the extent the phrase beginning "certainly" in the ultimate sentence does not conform to paras. 17 and 18 of this Decision. Denied in all other respects.
10	Denied. Gillespie testified "to the best of my knowledge" (Tr. 95-96) that the Republican candidate did not appear personally. See also, ruling on Western Broadcasting Company's Exception 21.
11 and 12	Granted to the extent that paras. 8 and 9 of the Conclusions seem to exculpate the licensee because of failure to know the Commission's implementations of Section 315 or to seek counsel with respect to the law. A licensee acting without advice of counsel acts at its peril. See para. 7 of this Decision. *Denied* in all other respects.
13, 18	Denied. See para. 17 of this Decision.
14	Denied. Para. 16 of the Conclusions of the Initial Decision is a reasonable interpretation of the record evidence.

Exception No.	*Ruling*
16	Denied. Para. 18 of the Conclusions of the Initial Decision is a reasonable interpretation of the record evidence.
17	Denied. See para. 16 of this Decision.
19	Denied. The last two sentences of para. 28 of the Conclusions of the Initial Decision are a reasonable interpretation of the record evidence. See also paras. 17 and 18 of this Decision.
21	Granted. See para. 23 of this Decision.
22	Denied. See paras. 24–28 of this Decision.
23	Denied. See para. 14 of this Decision.
24	Granted in part and denied in part. Granted to the extent the Summation is inconsistent with our rulings on the Broadcast Bureau's Exceptions 3, 5, 9, 11, 12, 15, and 21. Denied in all other respects.
25	Granted in part and denied in part. Granted to the extent that any portion of paras. 62 through 67 of the Summation of the Initial Decision are inconsistent with this Decision, Denied in all other respects.
26	Denied. No deliberate misrepresentations were found. See paras. 15–28 of this Decision.
27	Denied in accordance with this Decision.

Rulings on Exceptions of Western Connecticut Broadcasting Company

1	Granted in part and denied in part. Granted to the extent that the stations were reflections of Schwartz. Denied in that Gillespie's reliance on Schwartz, a layman, to know the law cannot absolve Gillespie of responsibility. See also paras. 7, 8 and 17 of this Decision.
2	Granted.
3	Denied. See para. 7 of this Decision and the ruling on Exception 1, *supra*.
4, 6–9, 11–14, and 16	Granted in part and denied in part. Granted to the extent necessary to conform to the conclusions in paras. 21–27 of this Decision. Denied in all other respects.
5	Denied. The Initial Decision correctly reflects the record which shows that Kuczo recalled only one script in which Schwartz made deletions which Kuczo protested.
10, 22–25 and 29	Denied. Decisionally insignificant.
15	Denied. The last sentence of para. 15 of the findings of the Initial Decision correctly reflects the record.
17	Denied. Para. 57 of the findings correctly reflects the record.
18 and 19	Granted. Add to paras. 58 and 60 of the findings that Sheldon in his conversations with Gillespie talked rapidly about a variety of subjects. See para. 18 of this Decision.
20	Granted in part and denied in part. Granted to delete any suggestion in paragraph 65 of the findings that Gillespie was lying when he said in 1970 that he did not remember Sheldon's complaints of 1968. Denied in all other respects. See para. 18 of this Decision.
21	Granted in part and denied in part. Granted to the extent that para. 67 of the findings is corrected to read that Gillespie testified that "to the best of my knowledge" the Republican candidate did not appear in any paid political announcements (Tr. 95–96) and that Schwartz testified that the Republican candidate "might have been" in some announcements, "but I'm not sure". (Tr. 311) Denied in all other respects.
26	Denied. See paras. 17, 19 and 20 of this Decision.
27	Denied. See para. 20 of this Decision.

Exception No.	*Ruling*
28	Denied. Sheldon did not state specifically that Schwartz was compelling deletion of material, but Sheldon's repeated expression of concern about Schwartz's treatment of Sheldon's scripts should have put Gillespie on notice that Schwartz's actions with respect to political candidates required some investigation, and to that extent Gillespie did not heed Sheldon.
30	Denied. Para. 21 of the Conclusions is supported by the evidence.
31	Denied. Para. 16 of the Conclusions is supported by the evidence. See paras. 8 and 17 of this Decision.
32 and 36	Denied. Para. 18 of the Conclusions is supported by the evidence. See paras. 17 and 18 of this Decision.
33	Denied. See para. 9 of this Decision.
34, 35, and 41–43	Granted.
37	Denied. See paras. 8 and 17 of this Decision.
38	Denied. Sheldon did not state specifically that Schwartz was compelling the deletion of material, but Sheldon complained repeatedly about Schwartz's interference with the scripts.
39	Denied. See paras. 19 and 20 of this Decision.
40	Denied. Para. 33 of the Conclusions is supported by the evidence. See also paras. 23–25 of this Decision.
44	Granted in part and denied in part. Granted to the extent that the record reflects that Schwartz's threats were made during heated arguments. Denied in all other respects. See paras. 23 and 17 of this Decision.
45	Granted in part and denied in part. Granted to the extent that para. 57 is inconsistent with paras. 10 and 11 of this Decision. Denied in all other respects.
46	Denied. See paras. 8 and 17 of this Decision.
47	Denied. The licensee is responsible for its general manager's derelictions because it failed to exercise adequate control and supervision consistent with its responsibilities. See paras. 8 and 17 of this Decision.

Dissenting Statement of Commissioner H. Rex Lee, in Which Commissioner Johnson Joins

On October 8, 1970, the Commission released its Order to Show Cause and Notice of Apparent Liability in this proceeding, which directed Western Connecticut Broadcasting Company to show cause why its licenses for Stations WSTC and WSTC–FM, Stamford, Connecticut, should not be revoked. In its Order, the Commission specified issues to determine whether Western had censored political broadcasts in violation of statutory and administrative prohibitions, had failed to afford equal opportunities to all qualified candidates for the same public office, had violated certain record-keeping and logging requirements of the Commission and had misrepresented facts to the Commission concerning its broadcast of political announcements. In a subsequent action, the Review Board enlarged the hearing issues to include a determination of whether Western's programming on WSTC and WSTC–FM had been meritorious, particularly with regard to public service offerings.[1] On June 9, 1971, the Commission denied a

[1] See 26 FCC 2d 1019, released December 30, 1970. In its Order, the Board indicated that evidence of a past broadcast record of meritorious programming "may mitigate adverse findings under the misrepresentation and character issues." However, in a later action involving another proceeding, the Board reversed its earlier position by holding that meritorious programming would not be of decisional significance in the face of willful mis-

petition for reconsideration of the Show Cause Order, filed by Western, in which the licensee contended that an evidentiary hearing was unnecessary, but admitted that its violations of the Communications Act and the Commission's Rules warranted the imposition of a monetary forfeiture.

Hearings in this proceeding were held in 1971, and, on August 4, 1972, the Administrative Law Judge released an Initial Decision in which he concluded that Western had illegally censored political broadcasts, had failed to provide equal opportunities to political candidates and had committed logging and record-keeping violations. In regard to the misrepresentation issue, the Judge found that although Western principals had made statements to the Commission that did not conform with the true facts, the statements did not constitute *deliberate* misrepresentations. He ultimately concluded that although the licensee had been derelict in carrying out its responsibilities, a monetary forfeiture of $10,000 was the appropriate sanction in this case, especially in view of the overall meritorious programming of the stations in the past, the absence of any political motivation for the unlawful censorship and the extensive corrective measures taken by the licensee. The Broadcast Bureau filed exceptions to the Initial Decision, claiming that Western is not qualified to remain a broadcast licensee and that its licenses for WSTC and WSTC-FM should be revoked. The Bureau contends that Western illegally censored paid political announcements broadcast by the Stamford stations, which are the only facilities licensed to the community, and that the seriousness of the Section 315 violations is compounded by the fact that Western's principal owner and general manager engaged in a series of misrepresentations to the Commission relating to the political broadcasts.

The majority admits that it is "seriously troubled with what appear to be gross contradictions between the facts as found by the Judge and the statements made by Schwartz" [2] and with the instance in which the Judge found that Kingsley Gillespie, president, treasurer, director and 51.6% owner of the licensee corporation, had engaged in an "inexcusable exaggeration." However, it appears to agree with the Judge's conclusions that neither Gillespie nor Schwartz *deliberately* misrepresented facts to the Commission and that the licensee's numerous violations of Section 315 of the Act and Commission regulations, which are characterized as "grievous" since they interfered with the free flow of information to the electorate, would justify license revocation in the absence of mitigating factors. According to the majority, the licensee's overall programming performance in the field of public affairs reflects a close attention to the goal of a well-informed electorate and to community needs and interests and such programming is "good enough to tip the scales against revocation and to permit a conclusion that West-

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representations to the Commission although it stated that such a programming showing could be used in mitigation of any evidence concerning the bribery of network officials. See *KFPW Broadcasting Co.*, 33 FCC 2d 313 (1972). The Commission thereafter set aside the Board's Order in the *KFPW* case and deleted the meritorious programming issue. The Commission concluded that no useful purpose would be served by adding such an issue since bribery of network officials (or other acts involving moral turpitude relating directly to the operation of a broadcast station) like willful misrepresentations to the Commission reflects so adversely on an applicant's (or licensee's) basic qualifications that there would be no reason to consider the merit of past programming. 40 FCC 2d 126 (1973).

[2] Julian Schwartz served as general manager of the Stamford stations from 1967 until November, 1970. During 1969, Schwartz was also secretary and a director of Western, but he no longer holds those positions.

ern is qualified to remain a licensee." Like the Judge, the majority imposes the maximum permissible forfeiture for the licensee's conduct.

I cannot join in the majority's decision for I believe that the hearing record compiled in this proceeding demonstrates in a very profound way that Western is not qualified to remain a broadcast licensee. The record indicates that, during the 1969 Democratic Party primary and general election campaigns for mayor of Stamford, Schwartz required all candidates, except the Republican Party mayoral candidate, to submit for review advance scripts of their paid political announcements and programs. Moreover, on numerous occasions, Schwartz deleted material from the scripts of the Democratic Party and Fusion Party candidates (Paul Kuczo, Jr. and John Nocerino, respectively) which he deemed objectionable. On the few occasions when the candidates opposed the deletions, Schwartz informed them that the changes would be made or they would not receive airtime on the Stamford stations. The deletions were required by Schwartz to preserve the stations' "image" although most of the material deleted from the scripts consisted of arguments normally made in a political campaign.

Kingsley Gillespie, Western's principal owner and publisher of the *Stamford Advocate* (the city's only daily newspaper), knew that Schwartz required the prior submission of political scripts and apparently approved the practice in spite of a clear Commission prohibition against it. Gillespie's reliance on an erroneous impression of Section 315 requirements derived from a National Association of Broadcasters' publication and on Schwartz's knowledge of those requirements cannot absolve him from full responsibility for the violations. Similarly, Gillespie must be held responsible for Schwartz's willful deletion of material from political scripts. Contrary to the majority's position, I believe that Gillespie knew that Schwartz was engaging in censorship. Even though he testified at the hearing that he had told Schwartz that he (Schwartz) had no power to change political scripts, the record indicates that Gillespie made no inquiries of either Schwartz or Nocerino (the Fusion Party candidate) when he was informed of Nocerino's broadcast complaint of censorship by WSTC during the 1969 mayoral campaign. Moreover, Gillespie had been advised of the stations' censorship practices in 1968 by Ralph Sheldon, a candidate in several primary contests. The only reasonable explanation for Gillespie's failure to act on the political candidates' complaints is that he already knew and approved of Schwartz's censorship practices.

Moreover, the censorship of political broadcasts by Schwartz was not only violative of statutory and administrative prohibitions, but also constituted a violation of the equal opportunities provision of Section 315 since it had the effect of favoring one candidate over the others. In contrast to the majority's view, I believe that the Administrative Law Judge was correct in concluding that the licensee should have foregone its policy of requiring a minimum separation between announcements of opposing candidates because it enabled the Republican Party candidate to schedule his announcements adjacent to the local news, a much more desirable time period for political announcements. It is more than apparent that the separation policy, as applied by WSTC, did not afford reasonably comparable time to the Fusion Party candidate and that, therefore, it violated the equal opportunities

provision of Section 315. It is also interesting to note in this regard that the stations did waive the separation policy on election eve to accommodate all candidates' requests for broadcast time.

The record evidence in this proceeding clearly indicates that the licensee violated Section 315 of the Communications Act and related Commission regulations by censoring political candidates and by failing to provide equal opportunities for all candidates. Schwartz required the prior submission of political broadcast scripts, reviewed the scripts submitted and, in some instances, deleted material under the threat of of depriving a candidate of airtime. The licensee cannot escape culpability for the actions of its general manager (who was also secretary and director of the corporation during 1969), especially since the record shows that Gillespie knew of and approved Schwartz's censorship. Moreover, Schwartz's activities led to a denial of equal opportunities since the censored candidates were effectively deprived of a full opportunity to make their cases before the electorate. In addition, enforcement of the stations' separation policy severely disadvantaged the Fusion Party candidate since the time period offered for political announcements was not reasonably comparable to that previously offered to the Republican Party candidate. While the hearing record may not establish beyond doubt that these violations resulted from a political bias on the part of the licensee and its principals, the facts remain that the activities of Schwartz favored one candidate; that Gillespie's newspaper, the *Stamford Advocate*, endorsed that same candidate; and that WSTC and WSTC-FM endorsed no candidate. In effect, only one mayoral candidate was endorsed by the local media in Stamford, and Schwartz's unlawful activities favored that candidate. In such circumstances, the licensee's Section 315 violations are seriously aggravated whether or not political bias can be ascribed thereto and are sufficient justification for license revocation.

Unlike the majority, I can see no valid reason for considering the merit of Western's past programming when the Section 315 violations reflect so adversely on the licensee's basic qualifications. In my own opinion, no amount of meritorious programming is sufficient to mitigate or offset the serious violations noted above. Moreover, the licensee's showing under the issue added by the Review Board is subject to fatal deficiencies. For example, the licensee relies on comparative figures, which are not necessarily indicative of meritorious programming. The fact that the Stamford stations may have carried more news programs than other comparable stations is insufficient reason to discount the seriousness of the violations. Moreover, as the Administrative Law Judge noted, the stations' record in regard to the carriage of public service announcements was poor in comparison with other stations, and the presentation of PSAs by WSTC and WSTC-FM was rendered ineffectual by their concentration on weekends and early Sunday morning periods. In any event, there seems to be a basic inconsistency in the majority's rationale which condemns the licensee's censorship practices for interfering with the "free flow of information to the electorate," but which credits the licensee's public affairs programming for contributing to the "goal of a well informed electorate." And this inconsistency is heightened by the majority's holding that its determination

under the programming issue does not necessarily create a preferred position for the licensee in any comparative proceeding involving a renewal application. Certainly, if Western's past programming is sufficient basis to avoid license revocation, it should accrue to the licensee's benefit in any future comparative case. The real point of the majority's statement is that the Stamford stations' past programming is not sufficient in any sense, let alone when measured in the context of a revocation proceeding.

My position on the Section 315 violations almost represents an academic exercise, however, when we consider the fact that both Gillespie and Schwartz engaged in a series of misrepresentations to the Commission. Contrary to the majority's conclusion, this is not a close case on the misrepresentation issue. As the Broadcast Bureau points out in its brief in support of exceptions, there are certain inescapable conclusions that are dictated by the evidentiary facts and that are not found in the Initial Decision or in the majority's opinion on appeal. Gillespie is chargeable with misrepresentation on three separate occasions. The first concerns his statement in an affidavit filed in support of Western's reconsideration petition to the effect that he was "shocked and distressed" to learn of Schwartz's censorship practices during the 1969 campaigns. In spite of his statement, the record evidence demonstrates that Gillespie was well aware of Schwartz's activities, including his deletion of material from paid political announcements over the candidates' objections. In his September 25, 1970, written statement to Commission investigators, Gillespie indicated that he knew of Schwartz's review of political scripts and that he expected review of *all* matters broadcast by the stations. Moreover, during the 1969 campaign, Schwartz advised Gillespie that the Fusion Party candidate had objected to script changes made by Schwartz. Also, Sheldon, whose testimony the Judge credited, had complained to Gillespie about Schwartz's censorship practices in 1968. Any speculation to the effect that Gillespie must have forgotten about Sheldon's complaints should be rejected in light of Gillespie's affirmative representation that he was "shocked" to learn of the censorship practices. In any event, evidence of Gillespie's knowledge of such activities is not limited to Sheldon's complaints.

The matter of Sheldon's complaints also involved another misrepresentation by Gillespie, who, in a September 28, 1971, affidavit submitted to the Commission, stated that Sheldon had *never* complained about Schwartz's censorship prior to September 16, 1971. As the Judge found, contrary to Gillespie's statement, Sheldon had complained to him on numerous occasions about censorship practices prior to September 16, 1971. The majority, like the Judge, concludes that "it is not improbable on the evidence that Gillespie was being truthful in denying Sheldon had complained" since he "probably did not remember Sheldon's complaints." The majority speculates that Gillespie had not been inclined to pay serious attention to Sheldon and had, therefore, forgotten about the complaints. On this basis, the majority absolves Gillespie of willful misrepresentation. However, the facts, as found by the Judge and accepted by the majority, show that Sheldon had complained to Gillespie in 1968 about Schwartz's censorship; that Gillespie testified that he was concerned about Schwartz's practice of

reviewing scripts since it carried with it the danger of censorship; and that Gillespie did remember many aspects of Sheldon's conversations when the latter visited the former's office at the *Stamford Advocate*. In short, the record evidence indicates that Gillespie's September 28, 1971, statement was false and that it was conveyed to the Commission with knowledge of its falsity. Any other conclusion requires a total adherence to the propriety of Gillespie's selective recall, which I cannot accept.

The third misrepresentation by Gillespie concerns his assertion in Western's petition for reconsideration (which he supported by an affidavit) that he did not learn of candidates' complaints until "long after the fact." At the hearing, Gillespie was asked when Schwartz told him about Nocerino's broadcast charge of licensee censorship. Gillespie initially agreed with Schwartz's testimony that he had been informed of the broadcast the next day—but when he was asked to explain his statement about "long after the fact," he indicated that he had not been informed of Nocerino's charge until two or three days after the broadcast. Even though the Judge concluded that Schwartz had informed Gillespie of the broadcast on the next day and that Gillespie was guilty of an "inexcusable exaggeration" (which diminished to the level of a "careless exaggeration" later in the Initial Decision), he did not find an *intentional* misrepresentation by Gillespie, and the majority agrees. The majority attempts to downgrade the impact of Gillespie's statement by pointing out that Gillespie did not learn of the charge until *after* the campaign and, therefore, the time differential is not significant. However, it is clear that the statement was not an "exaggeration" in any degree—it was another intentional misrepresentation by Gillespie, which was designed to minimize his responsibility for the stations' censorship violations and to convince the Commission that a hearing was not necessary. In addition, his change in testimony at the hearing represented an obvious attempt to give vitality to his earlier statement in the petition for reconsideraion and, as such, constituted a further attempt to deceive the Commission.

The hearing record also demonstrates that Schwartz engaged in intentional misrepresentations. In his statement to Commission investigators in July, 1970, Schwartz denied that he had censored the Democratic Party or Fusion Party candidates or that he had deleted material from their paid announcements. He stated that he had requested *all* candidates to submit scripts for his review and that he had made "suggestions" for script modifications. On September 25, 1970, he gave a second statement to the investigators in which he continued to deny that he had required changes in the political scripts although he admitted that he had required Kuczo and Nocerino to submit their scripts for review. In a December, 1970, affidavit (attached to Western's petition for reconsideration), Schwartz acknowledged that he could have insisted upon deletions in the scripts of the Fusion Party and Democratic Party candidates as a condition for their use of the stations' facilities and that he might have made the deletions himself—but that he had no independent recollection of these matters. In his hearing testimony, he stated that any deletions made were with the concurrence of the candidates and that if the candidates objected, the objectionable material remained in the scripts. As the majority points out, Schwartz

had required Kuczo and Nocerino (but not Wilensky, the Republican candidate) to submit their announcements for review prior to broadcast; he required alterations in the scripts; and he threatened the loss of airtime if deletions were not made.

Even though the Judge concluded in his Initial Decision that Schwartz's testimony was false in all material respects, he found that Schwartz had not engaged in deliberate misrepresentations. In so finding, the Judge relied on his observation of the witness' demeanor at hearing and on responses which indicated that Schwartz had a poor recollection of many events (and on the possibility that Schwartz had been suffering from emotional stress in 1969). The majority agrees with the Judge's conclusions, but it asserts additional reasons for absolving Schwartz—his age in 1969; his position of control at the stations for a long period; the candidates' acquiescence in script alterations; etc. The majority reasons that "it is not improbable, given these circumstances, that in fact Schwartz did believe in retrospect that he had not forced the changes on the candidates" and that heated opposition by the candidates would "create an additional immediate stress which could account for Schwartz's failure to remember any threats he had made in the course of the arguments."

In my own view, the crucial question here is not whether Schwartz's testimony at the hearing was true or not, but whether he lied in statements to the Commission before the hearing. Therefore, the Judge's observation of Schwartz's demeanor is not relevant in assessing his state of mind at the time he responded to Commission inquiries and supported Western's petition for reconsideration. The fact remains that the Judge repeatedly rejected Schwartz's testimony about his activities in 1969 at the Stamford stations. In such circumstances, demeanor findings are not necessary to arrive at the true facts and are certainly not conclusive with regard to Schwartz's pre-hearing representations as the majority holds. In effect, Schwartz misrepresented material facts in his statements to Commission investigators, in his affidavit and in his testimony in an obvious attempt to absolve himself of serious wrongdoing. Moreover, it is clear that any emotional stress that might have prevented a clear recollection of his role in the 1969 political broadcasts did not hinder his ability to make affirmative representations to the Commission, which were found to be untruthful.

In summary, the record evidence clearly establishes that Western violated the political censorship prohibition and equal opportunities requirement of Section 315 of the Communications Act and related Commission regulations during the 1969 mayoral elections in Stamford; that the licensee's principal owner, who was aware of the unlawful practices at WSTC and WSTC-FM, controls Stamford's only daily newspaper; and that the political censorship engaged in by Schwartz interfered with the free flow of information to the electorate. Contrary to the majority's position, the licensee's past programming, even if found to be meritorious, cannot diminish the impact of the Section 315 violations, which effectively favored the candidate endorsed by the *Stamford Advocate*. Even if the record in this proceeding does not establish that the licensee's censorship was politically motivated, it is clear that the Section 315 violations alone would be sufficient

reason to revoke the Stamford stations' licenses. However, a decision to revoke the licenses need not rest solely on that basis, for the evidence of record also shows that the licensee's principal owner and long-term general manager misrepresented material facts to the Commission during the investigation of the censorship matters and continued through Western's petition for reconsideration and even into the hearing itself. Since past programming, even of a meritorious nature, cannot be used to mitigate the impact of deliberate misrepresentations to the Commission, the only viable sanction available here is revocation of license. I am very concerned about the majority's decision since it appears to permit a major departure from the traditionally strict standards of candor and honesty imposed on Commission licensees. *WPRY Radio Broadcasters, Inc.*, 40 FCC 2d 1183, 27 RR 2d 1043 (1973); *Milton Broadcasting Co.*, 34 FCC 2d 1036, 24 RR 2d 369 (1972), *affirmed*, Case No. 72-1583, D.C. Cir., January 30, 1973; *Continental Broadcasting, Inc.*, 15 FCC 2d 120, 14 RR 2d 813 (1968), *affirmed*, 142 U.S. App. D.C. 70, 439 F. 2d 580, 20 RR 2d 2126 (1971). Therefore, I must dissent.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs vs. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	)	Civil Action No. B-263

MOTION FOR SUMMARY JUDGMENT

Defendant Julian Schwartz, moves pursuant to Rule 56(b) of the Federal Rules of Civil Procedure for summary judgment, in his favor, on the ground that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law.

In support of his Motion, he submits the following:

(a.) AFFIDAVIT OF JULIAN SCHWARTZ

(b.) All documents and affidavits of KINGSLEY GILLESPIE as on file and as part of Motion of Western Connecticut Broadcasting Company and Kingsley Gillespie for summary judgment including memorandum of law.

Defendant, Julian Schwartz

October 8, 1976

By_____

Leo Gold
Mackler and Gold
His Attorneys
589 Bedford Street
Stamford, Conn. 06901

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	)	Civil Action No. B-263

AFFIDAVIT OF JULIAN SCHWARTZ

Julian Schwartz, being first duly sworn deposes and states as follows:

1. I served as general manager of Radio Station WSTC from 1947 through November 1970.

2. The radio station is owned and operated by The Western Connecticut Broadcasting Company, a Connecticut corporation, whose president and majority stockholder is Kingsley Gillespie.

3. During my 23 years as general manager of the radio station, I had complete supervision of station programming, policies and personnel. I consulted with Kingsley Gillespie on those matters and the final decisions on policy matters were his.

4. In 1969, the mayoral candidates in Stamford were Julius Wilensky, Republican; Paul Kuczo, Jr. Democrat; and John P. Nocerino, Fusion Party. All three candidates received coverage

by the station news department, and they also purchased time for spot announcements and programs.

5. From time to time during the campaign I found material in the Kuczo and Nocerino scripts that was, in my opinion, in poor taste. In deleting this material, my only intention was to assist the candidates and to protect the station's image.

6. In no way was the deletion of this material politically motivated.

7. I was concerned about name calling and libelous statements. I wanted to preserve the good image of the station and by so doing I also felt I was helping the candidates.

8. I realize now that by reviewing the Kuczo and Nocerino scripts that this constituted a violation of the Communications Act and for this The Western Connecticut Broadcasting Company was fined by the Federal Communications Commission.

9. At no time during the 1969 political campaign did I meet with Kingsley Gillespie for the purpose of conspiring against Kuczo and Nocerino. I never gave any instructions nor did I ever receive any instructions which were designed in any way to favor any candidate over another.

10. Throughout the campaign, the news department handled news releases and stories about all the candidates and the candidates to my knowledge were treated equally. I supervised the activities of the news department.

11. Although the FCC fined Western Connecticut, it noted

that I was not politically motivated in reviewing the scripts but rather I was attempting to apply a standard of good taste.

12. During the 23 years with the radio station, I have never sought political office, nor have I been active in any political party or with any particular candidate.

13. I have personal knowledge of the matters contained in this affidavit and make this affidavit in support of the motion for summary judgment.

Julian Schwartz

Sworn to and subscribed before me this 8th day of October, 1976.

Leo Gold
Commissioner of the Superior Court

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. and JOHN J. P. NOCERINO Plaintiffs: vs. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE, and JULIAN SCHWARTZ Defendants:	CIVIL ACTION No. B-623

MEMORANDUM IN OPPOSITION TO
MOTION FOR SUMMARY JUDGMENT

This action is brought by two plaintiffs claiming unlawful discrimination under the applicable constitutional provisions and the statutes contained in 42 USCA §1985 and in 28 USCA §1343.

The arguments are made that because no federal offices were concerned in the described elections, there is no jurisdiction; that the Complaint does not adequately describe a conspiracy; and that there is not alleged the existence of an affected class.

So far as the Complaint is concerned, the Memorandum of the examining Magistrate filed March 16, 1973 points out "...that the existing complaint itself alleges facts in greater detail than would ordinarily be required in federal pleading..."

Whether or not there was a conspiracy is entirely a question of fact to be determined by the Court upon hearing

the applicable evidence. From a reading of the report of examiner Honig for the Federal Communications Commision, there would not seem to be a great deal of doubt as to the existence of an actual conspiracy designed to affect the candidacies of both Kuczo and Noderino.

The fact that this was a state election does not change the discriminatory features of the case. Any citizen may appeal in a federal court to ask for relief or damages where his individual constitutional rights have been affected. United States v. Classic 313 US 299, 85 L ed 369. See also Annotation 162 ALR 1373, Snowden v. Hughes 321 US 1, 88 L ed 497. See Annotation 89 L ed 509.

The case is not one for summary judgment. There are serious questions of fact to be determined: (a) What were the rights of these two plaintiffs and were they infringed?, (b) Having found that there were rights, were they rights protected by the Fedreal Constitution?, and (c) Was there a conspiracy by two or more persons to deprive these plaintiffs, or either of them, of those rights, or unlawfully to infringe upon them?

These questions cannot be answered by motion. The case is presently assigned for trial. It is suggested that the ultimate ruling be made upon the facts as elicited upon that trial.

Respectfully submitted,

BY /s/Sidney Vogel
SIDNEY VOGEL
25 Third Street
Stamford, Connecticut 06905
Attorney for Plaintiffs

THIS IS TO CERTIFY that a copy of the foregoing motion was mailed on October 21, 1976, postage prepaid to:

Leo Gold, Esq.
Mackler and Gold
589 Bedford Street
Stamford, Connecticut 06901

Paul C. Jamieson, Esq.
500 Summer Street
Stamford, Connecticut 06901

/s/Sidney Vogel
SIDNEY VOGEL

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. and JOHN J. P. NOCERINO Plaintiffs	:	
vs.	:	CIVIL ACTION No. B-623
WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE, and JULIAN SCHWARTZ Defendants	:	

A F F I D A V I T

STATE OF CONNECTICUT)
: ss: Stamford October 21, 1976
COUNTY OF FAIRFIELD)

PAUL KUCZO, JR., having first been duly sworn, does on his oath depose and say:

1. He is a person of mature age and cognizant of the nature of an oath.

2. He is a teacher in the Stamford, Connecticut school system.

3. In the year 1969 he ran as the Democratic candidate for Mayor of Stamford and was defeated by the Republican opponent, Mr. Julius Wilensky.

4. During both the Democratic Primary Campaign and the Mayoralty Election Campaign he purchased time for political broadcasts on radio station WSTC in Stamford.

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5. All purchases were made through Mr. Julian Schwartz, the General Manager of station WSTC. He demanded payments in advance for all broadcasts and required that political material from Mr. Kuczo be submitted to him for his review and approval prior to actual broadcast. In almost all cases Mr. Schwartz censored or deleted part of Mr. Kuczo's prepared text.

6. Mr. Schwartz also refused to allow political broadcasts in languages other than English, even though the station had three such programs on the air each week on Saturday and Sunday.

7. Mr. Schwartz stated that existing policy did not permit the broadcast of political material in foreign languages, but nonetheless permitted Mr. Vincent Martino, host of the "Italian Hour", to broadcast political announcements for Mr. Wilensky in Italian.

8. September 27, 1969, Mr. Bruno Giordano, then Mayor of Stamford, who had been defeated by Mr. Kuczo in the Democratic Primary for the Mayoralty nomination, launched a personal attack on Mr. Kuczo. No copy of Mr. Giordano's remarks were furnished by WSTC management, nor was equal time offered in rebuttal.

9. The same was true of other personal attacks against Mr. Kuczo.

10. On another occasion Mr. Schwartz would not allow a broadcast concerning Mr. Wilensky's former activities regarding union membership and rights while he was employed at the Yale & Town Company.

11. I am satisfied that I was not treated equally with Mr. Wilensky during the course of this campaign.

12. This Affidavit is made in answer not only to the

motion of Western Connecticut Broadcasting Company and Mr. Kingsley Gillespie, but in answer to the motion of Mr. Julian Schwartz.

13. This Affidavit is made not only on behalf of Paul Kuczo, Jr., but on behalf of Mr. John J. P. Nocerino, who was a Fusion Party candidate in the same election for the same office.

/s/Paul Kuczo, Jr.
PAUL KUCZO, JR.

Subscribed and sworn to
before me this 21st
day of October, 1976.

/s/George G. Baxter, III
Notary Public
My commission expires: 4/1/80

THIS IS TO CERTIFY that a copy of the foregoing Affidavit was mailed on October 21, 1976, postage prepaid to:

Leo Gold, Esq.
Mackler and Gold
589 Bedford Street
Stamford, Connecticut 06901

Paul C. Jamieson, Esq.
500 Summer Street
Stamford, Connecticut 06901

/s/Sidney Vogel
SIDNEY VOGEL

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	Civil Action No. B-263

REPLY TO OPPOSITION TO MOTION
FOR SUMMARY JUDGMENT

Defendants Western Connecticut Broadcasting Company and Kingsley Gillespie, by their attorney, herewith reply to the plaintiffs' opposition to the Motion For Summary Judgment filed by the defendants.

Affidavit of Paul Kuczo, Jr.

The affidavit of plaintiff, Paul Kuczo, Jr., submitted in opposition to the defendants' motion utterly fails to raise a triable issue of material fact. Those portions of the affidavit that meet the testimonial requirements of Rule 56 (e) of the Federal Rules of Civil Procedure are merely repetitious of the allegations contained in the complaint and of the statements submitted with the defendants' Motion. They do not set forth specific facts showing that there is any genuine issue for trial. Viewed in the most favorable light, Kuczo's affidavit is the best indication that a trial is not necessary to resolve this matter.

MEMORANDUM OF LAW

Plaintiff's Memorandum In Opposition cites inapposite, albeit unsupportive, case law, ignores the deficiencies in their Section 1985 and constitutional claims and fails to meet

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the requirements of Local Rule 10(a) 3.

Plaintiffs' citation to United States v. Classic, 313 U.S. 299 (1941), and an A.L.R. annotation, has absolutely no relevance to either their complaint or defendants' summary judgment motion. At best, the citation can be described as baffling. In United States v. Classic, supra the Supreme Court held that state and local officers who, while acting in their official capacities, violate federal rights, may be subjected to criminal prosecution in federal courts under appropriate federal statutes. That case dealt with Sections 19 and 20 of the Criminal Code of 1909, codified in the Federal Criminal Code at 18 U.S.C. SS241-42. And in Snowden v. Hughes, 321 U.S. 1 (1944) the Court affirmed a lower court dismissal of a complaint based on an alleged violation of the Fourteenth Amendment and the Civil Rights Act. Although it was the actions of state officers that were challenged, the Court did not even need to reach the question of state action, but held that the right asserted by the petitioner was not one secured by the Fourteenth Amendment.

The plaintiffs do not dispute the absence of any state action or the failure to establish a class that has been invidiously discriminated against. Nor do they contend that there has been a denial of equal protection of the law or of equal privileges and immunities under the law. And they further avoid mention of the relevant conspiracy law presented by the defendants. In short, the Memorandum submitted by the plaintiffs implicitly admits their failure to present a Section 1985 cause of action.

Finally, the requirement of Local Rule 10(a)3 that, "(t)he papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to

be tried" has been ignored. The plaintiffs' questions (a), (b) and (c) presented in the Memorandum are, in fact, purely legal questions which have already been addressed in depth in the defendants' previously submitted "Memorandum of Law." These questions neither concern material facts nor present genuine issues for trial.

In light of plaintiffs' opposition, as discussed above, defendants' Motion For Summary Judgment should be granted.

Respectfully submitted,

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Attorney for Defendants
Western Connecticut Broadcasting
Company and Kingsley Gillespie

October 28, 1976

Of Counsel:

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Certificate of Service

This is to certify that copies of the foregoing 'Reply To Opposition To Motion For Summary Judgment' was mailed, postage prepaid, on October 28, 1976 to the following:

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Paul C. Jamieson

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DEC 22 11 22 AM '75
U.S. DISTRICT COURT
BRIDGEPORT, CONN.

PAUL KURTO, JR. and
JOHN J. P. NOCERINO,

Plaintiffs,

-v-

WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE, and JULIAN SCHWARTZ,

Defendants.

MEMORANDUM DECISION

Civil Action
No. B-623

SUBMITTED

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MICROFILM
DEC 30 1976
BRIDGEPORT

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Attorneys for defendants Western Broadcasting Company and Kingsley Gillespie

LUMBARD, Circuit Judge:*

Defendants Western Connecticut Broadcasting Company ("Western") and Kingsley Gillespie have moved for summary judgment in this action brought by two unsuccessful mayoral candidates in the Stamford, Connecticut 1969 election who are seeking damages for censorship of their radio advertisements in violation of the first amendment. For the reasons hereinafter discussed, the motion will be denied.

In 1969 Western was the Federal Communications Commission licensee of radio stations WSTC and WSTC-FM. These were the only stations licensed in Stamford, Connecticut, a city

*Sitting by designation.

Exhibit No. 1

of over 100,000 persons. Defendant Julian Schwartz was the general manager in charge of the day-to-day operation of the station. He consulted on a regular basis with Gillespie, the president and majority stockholder of Western.

In the 1969 elections there were three candidates for Mayor of Stamford--Julius Wilensky, Republican; plaintiff Paul Kuczo, Democrat; and plaintiff John J.P. Nocerino, Fusion Party--and each ran a number of paid political announcements and programs on WSTC and WSTC-FM during the campaign. All scripts of Kuczo's and Nocerino's broadcasts were reviewed prior to air-time by Schwartz at his insistence and on a number of occasions Schwartz ordered the excision of material that he claimed was in bad taste. For various reasons, however, Schwartz considered it unnecessary for him to review the scripts of the third candidate, Wilensky. Gillespie admits that he had approved Schwartz's policy of reviewing scripts, but denies knowledge of any compulsory excisions.

The election was won by Wilensky with 19,816 votes to Kuczo's 15,415 and Nocerino's 723. After a hearing before one of its examiners, the FCC held the review and censorship of candidates' scripts to be a flagrant violation of section 315(a) of the Communications Act of 1934, 47 U.S.C. § 315, and regulations thereunder, and Western was fined $10,000.[1]

Conceding, as they must, that the censorship was contrary to first amendment standards, see New York Times Co. v. United States, 403 U.S. 713, 714 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66, 70 (1963), defendants maintain that no violation of the first amendment occurred because there was no governmental action. The excisions were made by a private employee acting in the course of his employment with a private corporation, and his

actions were not only not approved by the FCC but were specifically condemned by it in subsequent review proceedings. Defendants point out that government regulation does not always convert private conduct into governmental action for purposes of the fourteenth amendment and the Bill of Rights. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 350 (1974); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 176-77 (1972). It has not been resolved what actions by broadcasters licensed and regulated by the FCC constitute federal action. Compare CBS, Inc. v. Democratic National Comm., 412 U.S. 94, 114-20 (1973) (Burger, C.J., plurality opinion), with id. at 146-47 (White, J., concurring), id. at 172-81 (Brennan, J., dissenting), and Writers Guild v. FCC (C.D. Cal. November 4, 1976), summarized at 45 U.S.L.W. 2241.

"[T]he inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." Jackson v. Metropolitan Edison Co., supra at 351; Moose Lodge No. 107 v. Irvis, supra at 176. Here the government has ensured that one radio station will have a monopoly of Stamford local airways. If a candidate in a local Stamford election wishes to reach eligible voters over the radio, WSTC and WSTC-FM are the most natural and efficient carriers available. Censorship by these stations has the same effect on free speech as would a Stamford local ordinance that censored political broadcasts over local radio stations. Thus, by giving Western monopoly control over the local airways, federal regulation has invested Western with the capacity to obstruct free speech in local elections. Monopoly is a prime concern of the first amendment. Having created and preserved the opportunity for abuses that are exactly what the first amendment is designed to prohibit, the government

and those who operate under a government license cannot avoid constitutional responsibility simply on the ground that the malefactor was not a government employee. Cf. Smith v. Allwright, 321 U.S. 649, 664 (1944).

It is this nexus between the governmental regulation and the constitutional right in issue that imbues the defendants' actions with governmental character vis-à-vis that right. Cf. Marsh v. Alabama, 326 U.S. 501 (1946). The Supreme Court has at times rejected government-established monopolies or partial monopolies as bases for a finding of state action, but only because "there was insufficient relationship between the challenged action of the entities involved and their monopoly status." Jackson v. Metropolitan Edison Co., supra at 352; Moose Lodge No. 107 v. Irvis, supra at 176; Public Utilities Comm'n v. Pollak, 343 U.S. 451, 462 (1952). Here, by contrast, it is the government's restrictions on competitive entry that magnify the impact which its licensee's decisions can have on free speech.[2]

That the defendants' censorship violated the government's laws and regulations does not insulate them from responsibilities for violations of the first amendment rights. The mere fact that conduct is prohibited by the government's own law does not mean that it cannot be governmental action for purposes of the fourteenth amendment and the Bill of Rights. See, e.g., Home Telegraph & Telephone Co. v. City of Los Angeles, 227 U.S. 278 (1913). Although governmental approval is one factor in the state action calculus, see The Supreme Court, 1974 Term, 89 Harv. L. Rev. 47, 145-47 (1975), it should not be dispositive where the functional nexus between governmental involvement and the constitutional concern is as strong as here. The

government has delegated its control over local airways to the radio station. For the frustrated candidate, censorship by the radio station has the same immediate impact on his freedom of speech whether or not government reprisals will ultimately be forthcoming against the censor long after the damage has been done. Consequently, we conclude that the actions by the radio station and its employees did constitute federal action subject to the first amendment under the circumstances of this case.[3]

The question of jurisdiction must also be considered. Since our finding of governmental action is premised on licensing and regulation by the FCC, a federal agency, clearly it is the first amendment that has been violated and not the fourteenth; thus 42 U.S.C. § 1983 is inapplicable, since there has been no action "under color of state law." Based on the materials submitted to us, which include the findings of fact by the FCC and an affidavit from defendant Gillespie, it is clear that plaintiffs do not have a cause of action under 42 U.S.C. § 1985(3). That section requires proof of a conspiracy to deprive a person of equal protection of the laws; there must be "class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). See also Kletschka v. Driver, 411 F.2d 436, 447 (2d Cir. 1969); Slegeski v. Ilg, 395 F. Supp. 1253, 1255 (D. Conn. 1975); Arnold v. Tiffany, 359 F. Supp. 1034, 1036 (C.D. Cal.), aff'd, 487 F.2d 216 (9th Cir. 1973), cert. denied, 415 U.S. 984 (1974). No such conspiracy was present here: not knowing that defendant Schwartz was treating the plaintiffs any differently from the Republican candidate Wilensky,[4] defendant Gillespie obviously cannot have been acting with any "discriminatory animus." Without a claim under 42 U.S.C.

§ 1983 or 1985, plaintiffs cannot use 28 U.S.C. § 1343(3) or (4) as their basis for jurisdiction.

Nevertheless, we find jurisdiction available under 42 U.S.C. § 1331. Plaintiffs have alleged more than $10,000 in controversy. In Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the Supreme Court held that victims of unconstitutional searches and seizures may invoke federal question jurisdiction in order to sue federal agents for damages directly under the fourth amendment. The right to free speech is certainly as fundamental a right as the right to be free from unreasonable searches and seizures. The compensatory and deterrent functions of a damage action are similar in both cases. Damage calculations for deprivation of free speech may be speculative or indeterminate but not markedly more so than for deprivations of fourth amendment rights. Nor should the availability of other remedies--license revocations and fines by the FCC[5]--make more difference here than they did in the Bivens case, where the Court specifically rejected the theory that the availability of state common law tort remedies foreclosed plaintiffs from suing for damages directly under the fourth amendment. Bivens, supra at 394-95. Thus, we find the reasoning of Bivens equally compelling for the first amendment as for the fourth, and accordingly we hold that actions for damages under the first amendment are cognizable under 42 U.S.C. § 1331.[6]

The motion for summary judgment made by defendants is denied.

J. EDWARD LUMBARD
Circuit Judge
(Sitting by designation)

December 6, 1976.

Footnotes

1. The initial decision of the hearing examiner is reported at 43 F.C.C. 2d 752 (1972), and the Commission's decision is at 43 F.C.C. 2d 730 (1974).

2. Of course, there is a slight possibility that Western might have been able to maintain a natural monopoly over radio broadcasting in Stamford even without the federal government's intervention. See Jackson v. Metropolitan Edison Co., supra at 351-52 n.8. It is also possible that the FCC may some day decide to license a second Stamford station. Regardless of these speculations, however, the crucial fact from the first amendment standpoint is that it was government regulation that intentionally ensured Western's monopoly at the time of the censorship.

3. In reaching this decision on governmental action, the court has not had to decide what all the boundaries of governmental action are in the FCC context. For example, oligopoly rather than monopoly radio stations, programing of a different character or addressed to different audiences, and situations where the free speech rights of the broadcaster are also involved may present more subtle issues than those obtaining in the present case.

4. This was the FCC's finding, see 43 F.C.C. 2d at 733, and the plaintiffs have relied on the FCC findings as their only evidentiary material on this summary judgment motion, see Fed.R.Civ.P. 56(e).

5. Several courts have rejected the possibility of implied private rights of action under the Federal Communications Act. See Daly v. Columbia Broadcasting System, Inc., 309 F.2d 83, 85 (7th Cir. 1962); Gordon v. NBC, 287 F. Supp. 452 (S.D.N.Y. 1968).

6. This question was reserved in Holcomb v. Avco Corp., 514 F.2d 285, 292 (2d Cir.), cert. denied, 423 U.S. 892 (1975).

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U.S. DISTRICT COURT
BRIDGEPORT, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	Civil Action No. B-263

MOTION TO AMEND ORDER TO PERMIT
APPEAL PURSUANT TO 28 U.S.C. §1292(b)

Defendants Western Connecticut Broadcasting Company and Kingsley Gillespie, by their undersigned attorney, respectfully request this Court to amend its Memorandum Decision so as to permit an appeal to be taken by defendants from said Decision as provided by 28 U.S.C. §1292(b), and submit herewith that:

1. On December 22, 1976, Circuit Judge J. Edward Lumbard (sitting by designation) filed and entered an order denying a motion for summary judgment filed by defendants on September 23, 1976.

2. As appears from the Memorandum Decision of the Judge and defendants' brief filed in connection with said motion the legal question raised involves a controlling question of law as to which there is substantial ground for difference of opinion.

3. An immediate appeal from said order will materially advance the ultimate termination of the above litigation.

4. The said order as entered is an order not appealable.

Wherefore, defendants request the Judge to amend his order to include the following statement:

> The undersigned is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, namely, whether the actions of the Western Connecticut Broadcasting Company and its employees constituted federal action subject to the first amendment due to Western's licensing and regulation by the Federal Communications Commission, and that an immediate appeal from this order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation. It is ordered that all proceedings herein be stayed for ten days from date of entry of this order. If, within such ten days, the defendants shall apply to the United States Court of Appeals for the Second Circuit for permission to appeal from this order, the proceedings herein shall be stayed pending determination of such application or of the appeal, if it is allowed.

In support of this Motion, defendants submit the attached, Memorandum of Law.

DEFENDANTS, Western Connecticut Broadcasting Company and Kingsley Gillespie

By Paul C. Jamieson
Paul C. Jamieson

January 6, 1977

Their Attorney
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BRIDGEPORT, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

PAUL KUCZO, JR. AND JOHN J. P. NOCERINO Plaintiffs v. WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE AND JULIAN SCHWARTZ Defendants	Civil Action No. B-263

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO AMEND ORDER TO PERMIT APPEAL PURSUANT TO 28 U.S.C. §1292(b)

This Memorandum is respectfully submitted by defendants Western Connecticut Broadcasting Company ("Western") and Kingsley Gillespie in support of their motion for amendment of the order denying their Motion For Summary Judgment.

INTRODUCTION

In a Memorandum Decision, entered by the District Court Clerk on December 22, 1976,*/ Circuit Judge J. Edward Lumbard (sitting by designation) denied defendants' Motion For Summary Judgment filed on September 23, 1976. The basis for denial was the conclusion that in light of Western's licensing and regulation by the Federal Communications Commission ("FCC") the actions of

*/ Counsel for defendants received a copy of the Memorandum Decision on January 4, 1977. Defendants' instant Motion is timely as a Motion to amend an order to include a 28 U.S.C. §1292(b) certification may be made at any time. See Rule 5(a), Fed. R. App. Pro; Moore's Federal Practice, ¶110.24.

its employees constituted federal action subject to the first amendment. Accordingly, this Court found that plaintiffs had stated a cause of action under the first amendment.

28 U.S.C. §1292(b)

In order to be appealable under 28 U.S.C. §1292(b), an interlocutory order must involve "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Defendants submit that all three requirements are met and that an immediate interlocutory appeal is both legally and factually appropriate.

1. The Order Involves A Controlling Question Of Law

Whether the actions of Western and its employees constituted federal action is clearly a controlling question of law in this case. This Court's order denying defendants' Summary Judgment motion was based solely on the legal conclusion that the actions of a broadcaster, licensed and regulated by the FCC, constitute federal action. It was premised on the undisputed facts presented to this Court by the defendants in their summary judgment papers. The Court denied plaintiffs' other fourteenth amendment and 42 U.S.C. §1985(3) claims. Thus, a different resolution of the federal action question will end plaintiffs' action in the district court.

2. There Is Substantial Ground For Difference Of Opinion On This Controlling Question Of Law

The question of what actions, if any, by broadcasters licensed and regulated by the FCC constitute federal action is, as

this Court noted, yet unresolved. See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973). However, previous court decisions have never held the FCC's regulation of broadcasters to be sufficient to constitute state action for purposes of imposing constitutional constraints on the actions of private licensees. (See Moro v. Telemundo Incorporado, 387 F. Supp. 920, 924-25 (D. P.R. 1974); Post v. Peyton, 323 F. Supp. 799, 802-04 (E.D.N.Y. 1971); McIntire v. Wm. Penn Broadcasting Co., 151 F.2d 597, 600-01 (3d Cir. 1945), cert. denied, 327 U.S. 779 (1946).

And the most recent Supreme Court statement on the "governmentional action" doctrine in Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) as well as the Court's plurality opinion in Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Committee, 412 U.S. 94 (1973), mandate a different resolution of the question of what constitutes federal action.

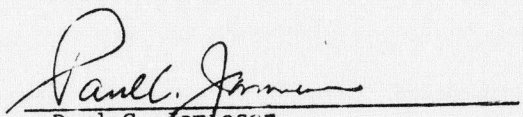
3. An Immediate Appeal From This Order May Materially Advance The Ultimate Termination Of The Litigation

An immediate appeal from this Court's order will materially advance the ultimate termination of the litigation for a reversal by the Circuit Court will end plaintiffs' action in the district court. In the Memorandum Decision, this Court rejected plaintiffs' fourteenth amendment and 42 U.S.C. §1985(3) claims to a cause of action. Should the appellate court decide that the actions of Western and its employees did not constitute federal action, plaintiffs' remaining cause of action, based on the first amendment, will also fail.

CONCLUSION

The question of what actions of FCC-licensed broadcasters in general, and of Western and its employees under the undisputed facts of this case, constitute federal action is both controlling and subject to substantial difference of opinion. Accordingly, an immediate appeal from this Court's order may materially advance the termination of this litigation and is thus warranted under 28 U.S.C. §1292(b). Therefore, defendants' respectfully request this Court to grant their "Motion To Amend Order To Permit Appeal Pursuant To 28 U.S.C. §1292(b)."

Respectfully submitted,



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January 6, 1977

Of Counsel:

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Certificate of Service

This is to certify that copies of the foregoing "Motion To Amend Order To Permit Appeal Pursuant To 28 U.S.C. §1292(b)" and "Memorandum Of Law In Support Of Defendants' Motion To Amend Order To Permit Appeal Pursuant To 28 U.S.C. §1292(b)" were mailed, postage prepaid, on January 6, 1977 to the following:

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Paul C. Jamieson

Paul C. Jamieson

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JAN 19 11 00 AM '77
US DISTRICT COURT
BRIDGEPORT, CONN

PAUL KUCZO, JR. and
JOHN J. P. NOCERINO,

Plaintiffs,

-v-

WESTERN CONNECTICUT BROADCASTING COMPANY, KINGSLEY GILLESPIE, and JULIAN SCHWARTZ,

Defendants.

ORDER

Civil Action
No. B-623

IT IS HEREBY ORDERED that the order of this court entered on December 22, 1976 be amended by appending the following statement:

> The court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, namely, whether the actions of the Western Connecticut Broadcasting Company and its employees constituted federal action subject to the first amendment, and that an immediate appeal from this order as authorized by 28 U.S.C. § 1292(b) may materially advance the ultimate termination of this litigation.

IT IS FURTHER ORDERED that all proceedings herein be stayed for ten days from date of entry of this order. If, within such ten days, the defendants shall apply to the United States Court of Appeals for the Second Circuit for permission to appeal from this order, the proceedings herein shall be stayed pending determination of such application or of the appeal, if it is allowed.

J. EDWARD LUMBARD
Circuit Judge
(Sitting by designation)

January 17, 1977.

Exhibit No. 2

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